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LAW REPORTS.

Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. XIV.

1872.—XXXV & XXXVI VICTORIÆ.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

HAYES *v.* OATLEY.

M. R.
1872
April 19.

[1871 H. 1.]

Trust—Settlement—Married Woman—Appointment by Will—Execution of Trusts of Will.

Under a settlement a sum of £10,000, secured by mortgage, was vested in trustees upon trust for *E. S.*, the wife of *W. S.*, for her life, and after her death for *W. S.* for his life, and subject as aforesaid, upon trust for such persons as *E. S.* should by deed or will appoint, and in default of appointment for *W. S.* *E. S.* made a will, by which she directed that *W. S.* should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after the death of *W. S.*, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to *W. S.*, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to *W. S.*; and part of the £5000 applicable to the payment of the pecuniary legacies was lost by him:—

Held, that the payment to *W. S.* was proper, and that the trustees were not answerable for the loss.

3 Ph. 145
5 L.J. 230
233,

BY virtue of two indentures, dated the 11th of December, 1838, a mortgage debt of £12,000 became vested in *William Jones* and

M. R.
1872
HAYES
v
OATLEY.

William Henry Oatley upon trust as to £2000, part thereof, for *Walter Stubbs* absolutely, and as to £10,000, the residue thereof, upon trust to pay the interest thereof to *Elizabeth Stubbs*, the wife of *Walter Stubbs*, during his life, and after her death to *Walter Stubbs* during his life, and, subject as aforesaid, upon trust for such persons as *Elizabeth Stubbs* should by deed or will appoint, and in default of appointment for *Walter Stubbs*, his executors, administrators, and assigns.

Elizabeth Stubbs, by her will, dated the 23rd of June, 1838, expressed her wish that her husband should enjoy her income during his life, after paying two annuities of £150 and £50 as therein mentioned; and at his decease she gave pecuniary legacies, amounting in the whole to more than £5000, out of the fund of £10,000. She made a codicil to her will, dated the 7th of October, 1844, in the following terms: "To prevent any doubt on the construction of my will, I hereby declare that the legacies given by my said will are to be payable and are to be paid only out of the sum of £5000 (so far as the said sum of £5000 may extend), one moiety or half part of the sum of £10,000, over which I have an appointing power under my settlement (subject to the interest for life of my said husband); and as to the remaining full moiety of the said sum of £10,000, I hereby appoint, give, and bequeath the same remaining moiety, being £5000, to my said dear husband, *Walter Stubbs;* all my estate whatsoever and wheresoever and all the residue of my personal estate, I give, devise, and bequeath to my said husband, *Walter Stubbs*, his heirs, executors, and administrators; I appoint the said *Walter Stubbs* to be executor of my will and codicil; and I confirm my said will in all respects save as it may be repugnant to this codicil; and I revoke the will so far as it is repugnant or inconsistent with this codicil."

Elizabeth Stubbs died on the 12th of October, 1844, and *Walter Stubbs* proved her will. After her death the mortgage debt of £12,000 was paid off by the persons entitled to the equity of redemption in the property subject thereto. A receipt for the debt was given by *William Jones* and *William Henry Oatley*, but the money was actually received by *Walter Stubbs*, who retained thereout the sums of £2000 and £5000 to which he was entitled, and invested £3000, part of the remaining £5000, to answer the

legacies given by the will of his wife. The residue of the last-mentioned £5000, amounting to £2000, was not invested by *Walter Stubbs*, and by reason of his insolvency was subsequently lost.

Walter Stubbs died in 1865, and *William Jones* in 1869.

In 1871 this suit was instituted by *William Hayes* and *Mary*, his wife (the latter of whom was a legatee under the will of *Elizabeth Stubbs*), against *William Henry Oatley* and the legal personal representatives of *William Jones*, to compel them to make good the sum of £2000 which had been lost.

Sir *R. Baggallay*, Q.C., and Mr. *W. R. Fisher*, for the Plaintiffs.

Mr. *Southgate*, Q.C., and Mr. *Phear*, for the Defendants:—

Mr. and Mrs. *Stubbs* between them had complete power over the fund. Mrs. *Stubbs* makes a will (which, with the assent of her husband, she could do quite irrespectively of the power in the settlement), and thereby purports to give her husband a life interest in the fund, charged with certain annuities, and also to give him £5000, part of the fund, and the residue of her property. Mr. *Stubbs* proved this will, and thereby assented to it, and thus agreed to take his life interest under the will and not under the settlement: *Ex parte Fane* (1). That being so, the whole fund was held on the trusts of the will, and the executor was the person to carry them into effect, not the trustees of the original settlement: *Re Philbrick's Settlement* (2). Moreover, the effect of the will is to appoint the fund to the husband as executor: *Wilday* v. *Barnett* (3)—a case which was approved of in *In re Wilkinson* (4).

Sir *R. Baggallay*, in reply:—

Mrs. *Stubbs'* will was an exercise of the power of appointment reserved to her by the settlement; and the effect of it was to make the pecuniary legatees *cestuis que trust* under the settlement. The fund was not distributable during the lifetime of the husband except with the assent of the pecuniary legatees, and the trustees are responsible for the loss which has occurred.

(1) 16 Sim. 406.
(2) 34 L. J. (Ch.) 368; 11 Jur. (N.S.) 558.
(3) Law Rep. 6 Eq. 193.
(4) Ibid. 4 Ch. 587.

M. R. 1872 HAYES v. OATLEY.

In the case of *Re Philbrick's Settlement* (1) there was no prior life interest, and consequently the decision does not affect the present question.

LORD ROMILLY, M.R.:—

I entertain no doubt that the trusts of the settlement were completely discharged when the trustees paid over the £10,000 to the executor of Mrs. *Stubbs*. If it were not so, the trustees would have to carry into effect all the limitations of her will. I think that it is a mistake to say that her will did not come into operation until the death of her husband.

The bill must be dismissed with costs.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland*, agents for Mr. *W. S. Hayes, Halesowen;* Mr. *William Potts*, agents for Messrs. *Potts & Son, Broseley*.

M. R. 1872 *April* 22.

SHEARMAN *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

[1871 S. 2.]

Mortgagor and Mortgagee—Policy of Assurance—Payment of Premiums by Mortgagor subsequently to Bankruptcy—Lien—Salvage Money.

The mortgagor of a policy of insurance became bankrupt, but, notwithstanding his bankruptcy, continued to pay the premiums on the policy:—

Held, that the premiums so paid were in the nature of salvage moneys, and ought to be repaid, with interest at 4 per cent., out of the policy moneys.

17 Eq 319
19 Eq 10
7 Ch D 825
23 Ch D 554
562.

THOMAS *POCKNALL*, having insured his life with the *British Empire Mutual Life Assurance Company*, deposited the policy in 1863 with the Plaintiff, as a security for a debt due from him to the Plaintiff. In October, 1865, *Thomas Pocknall* was adjudicated bankrupt; but notwithstanding his bankruptcy he continued to pay the premiums up to the time of his death, which took place in July, 1870. After his death his widow and legal personal representative set up a claim to the policy moneys, and this bill was filed against

(1) 34 L. J. (Ch.) 368; 11 Jur. (N.S.) 558.

the insurance company, the assignee in the bankruptcy, and the widow of *Thomas Pocknall*, seeking that these moneys might be applied towards payment of the Plaintiff's debt, which exceeded the amount thereof.

The company paid the policy moneys into Court and were dismissed. The assignee in bankruptcy disclaimed.

Previously to the institution of the suit the Plaintiff offered to pay to Mrs. *Pocknall* a sum larger than the amount of the premiums paid subsequently to the bankruptcy, with interest thereon at 4 per cent.

Mr. *Method*, for the Plaintiff.

Mr. *E. Ford*, for Mrs. *Pocknall*, contended that the bankruptcy relieved *Thomas Pocknall* from all obligation to pay the premiums, and therefore that the payments made subsequently to that time must be treated as if made by a stranger; and that, under these circumstances, the policy must be treated as being kept up for his benefit: *Foster* v. *Roberts* (1); or at all events, that he was entitled to a lien for the premiums and interest.

Mr. *Method*, in reply, cited *Burridge* v. *Row* (2); *Clack* v. *Holland* (3); *Norris* v. *Caledonian Insurance Company* (4).

The MASTER OF THE ROLLS said that the Plaintiff was clearly entitled to the policy moneys, but that the premiums paid subsequently to the bankruptcy were in the nature of salvage moneys, and that the Plaintiff must repay them to Mrs. *Pocknall*, with interest at 4 per cent. He was of opinion, however, that she ought to have accepted the offer made to her before the institution of the suit.

It was arranged that the costs of the suit should be treated as set off against the premiums, and a decree was made for payment of the policy moneys to the Plaintiff.

Solicitors: Mr. *Sismey*; Mr. *B. Hope*.

(1) 29 Beav. 467. 7 Jur. N.S. 460
(2) 1 Y. & C. Ch. 83.
(3) 19 Beav. 262. 18 Jur. 1027
(4) Law Rep. 8 Eq. 127.

M. R.
1872
April 26.

In re CONTRACT CORPORATION.

DRUITT'S CASE.

Companies Act, 1862, *s.* 115—*Summons to examine Witness*—*Costs.*

Under sect. 115 of the *Companies Act*, 1862, the manager of a bank where a contributory has had an account is liable to attend and be examined, and to produce any books and documents relative to such account.

THIS was an application made under sect. 115 of the *Companies Act*, 1862, on behalf of the official liquidator of the *Contract Corporation, Limited*, to compel *Thomas Druitt*, the manager of the *Charing Cross* branch of the *Union Bank of London*, to attend before the Chief Clerk for examination, and to produce any documents relating to the banking account of *John Forbes*, who was a contributory of the company.

On the 23rd of April, 1866, when the order was made to wind up the company, *Forbes* was the holder of twenty-five shares, in respect of which calls were made amounting to £85 a share. As these calls were unpaid on the 27th of March, 1868, the usual four-day order was made; but the money was not paid, nor could *Forbes's* address be found.

The liquidator having ascertained that *Forbes* had an account at the *Charing Cross* branch of the *Union Bank of London*, and having reason to believe that the manager knew *Forbes's* address, an order was obtained for substituted service of the four-day order on the manager of the bank, and he was summoned to attend before a special examiner, and to produce all books or documents relating to *Forbes's* banking account. The manager attended on the 26th of March, 1872, but refused to be sworn or examined.

It appeared that *Forbes* had, before the summons, closed his banking account. The manager submitted that as the banking account was now closed, and as his only knowledge of the affairs of *Forbes* had been obtained during the confidential relationship that subsisted between the bank and *Forbes* as one of its customers, he was not bound to answer any questions respecting them.

M. R. 1872 DRUITT'S CASE.

Sir *R. Baggallay*, Q.C., and Mr. *Romer*, for the official liquidator, in support of the motion, submitted that under sect. 115 of the *Companies Act*, 1862, the manager was bound to attend and be examined, and to produce the documents required. They referred to *Bloxam's Case* (1), *In re Smith, Knight, & Co.* (2), *Swan's Case* (3), and *Clement's Case* (4).

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the manager of the bank, submitted that, as his knowledge respecting *Forbes* was only obtained through the confidential relationship of banker and customer, he could not be compelled to give evidence.

LORD ROMILLY, M.R.:—

This is just one of those cases for which the 115th section of the Act was intended to provide. An order must be made for the attendance of the manager, and for the production of the books and papers required so far as they relate to *Forbes's* account; but he is not bound to disclose anything that may affect any other account. I will make no order as to costs, except that the official liquidator may have his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Linklaters & Co.*
Solicitors for the Bank: Messrs. *Davies, Campbell, & Reeves.*

(1) 36 L. J. (Ch.) 687.
(2) Law Rep. 4 Ch. 421.
(3) Law Rep. 10 Eq. 675.
(4) Ibid. 13 Eq. 179, n. W N (68) 102

W N (86) 259.

M. R.
1872.
May 2.

In re LAND CREDIT COMPANY OF IRELAND.

TROWER AND LAWSON'S CASE.

Companies Act, 1862, s. 115—*Summons to examine Witness—Costs.*

9 Ch. D. 167

Under sect. 115 of the *Companies Act*, 1862, any person indebted to a contributory is liable to attend and be examined as to the means of the contributory.

Witnesses summoned under sect. 115 of the Act, and refusing to attend, will in future be liable to pay the costs of compelling their attendance.

THIS was an application to compel the attendance of two witnesses, who were formerly partners of *H. Trower*, a contributory of the *Land Credit Company of Ireland, Limited*, to give evidence in the winding-up, and to produce the ledger, the cash book, and the cheque book of the firm.

It appeared that *Trower* had left the firm, that he was residing abroad, and that a sum was due to him from the firm.

The witnesses objected to attend and produce the documents in question.

The present motion was made on behalf of the official liquidator under sect. 115 of the *Companies Act*, 1862.

Mr. *Southgate*, Q.C., and Mr. *H. M. Jackson*, for the official liquidator, referred to *Druitt's Case* (1).

Sir *R. Baggallay*, Q.C., and Mr. *Merewether*, for the witnesses.

LORD ROMILLY, M.R.:—

Any person who is indebted to a contributory is liable to be summoned under sect. 115 of the *Companies Act*, 1862, and to give information respecting the means of such contributory. The witnesses must, therefore, attend and produce the documents. I will make no order against them as to costs in this case; but as the rule is now established I shall in future give costs against recalcitrant witnesses.

Solicitor for the Official Liquidator: Mr. *H. Gover*.

Solicitors for the Witnesses: Messrs. *Lawford & Waterhouse*.

(1) *Ante*, p. 6.

In re SHAW'S SETTLED ESTATES.

M. R.
1871
Dec. 8.

Settled Estate—Sale—Interim Investment of Purchase-Money—Leases and Sales of Settled Estates Act (19 & 20 *Vict. c.* 120), *s.* 25—23 & 24 *Vict. c.* 38, *ss.* 10, 11.

Money received by trustees upon a sale under the *Leases and Sales of Settled Estates Act* can be invested temporarily only in Exchequer bills or consols as directed by sect. 25 of the Act, and cannot be invested in any of the other investments in which cash under the control of the Court may be laid out.

In re Cook's Settled Estates (1) not followed.

Post 31
16 Eq 533.
20 Eq 469.
26 Ch D 205
22 Ch D 95

THIS was a Petition under the *Leases and Sales of Settled Estates Act*, praying that a provisional contract for the sale of a settled estate might be confirmed, and that directions might be given for the payment of the purchase-money to trustees, and for the interim investment thereof in any of the investments in which cash under the control of the Court may be invested.

The order had been made as prayed; but the Registrar refused to draw it up, on the ground that sect. 25 of the *Leases and Sales of Settled Estates Act* expressly provides that the interim investment shall be in Exchequer bills or consols.

Mr. *Freeman* now mentioned the matter to the Court, and referred to *In re Cook's Settled Estates; In re Morgan's Settled Estates* (before Vice-Chancellor *Malins* on the 26th of February, 1870).

THE MASTER OF THE ROLLS said that the decision in the case of *In re Cook's Settled Estates* was inconsistent with his own previous decisions, and declined to follow it.

Solicitors: Messrs. *Rogerson & Ford.*

(1) Law Rep. 12 Eq. 12.

Followed in Re Boyd W.N. (73) 115. 21 W.R. 167.
But see Re Taddy L.R. 16 Eq 537. 21 W.R. 96.

V.-C. M.
1872
Feb. 24.

In re CITY TERMINUS HOTEL COMPANY.

SOUTH EASTERN RAILWAY COMPANY'S CLAIM.

Loan to a Company—Security of Shares—Shareholders or Creditors.

A hotel was built at the *London* terminus of a railway, by a company, on land leased to them by the railway company. The hotel company borrowed money from the railway company, to complete their hotel, upon the security of unissued shares, which were placed in the names of trustees, with power to sell the shares and reduce the amount of debt. The hotel was afterwards sold to the railway company, and the hotel company was thereupon wound up:—

Held, upon summons under the winding-up, that the two companies being distinct and separate, the railway company were not to be treated as shareholders in the hotel company, but as creditors, and were entitled to deduct from their purchase-money the advance made upon the security of the shares.

THIS was an adjourned summons under the winding-up of the *City Terminus Hotel Company, Limited.*

In the year 1864, the *South Eastern Railway Company* were constructing their branch of the *Charing Cross Railway* into *Cannon Street.* It was necessary for the purposes of the station there, to take a considerable amount of property fronting *Cannon Street.*

The *City Terminus Hotel Company* was formed in 1864 for the purpose of erecting a first-class hotel upon a portion of this land which was not required for the purposes of the railway, and by an arrangement between the hotel company and the railway company authorized by Act of Parliament, the hotel company were to erect the hotel, and the lower part thereof was to be appropriated as railway offices, for the building of which the railway company agreed to pay the hotel company £15,000; and the railway company granted to the hotel company a lease of the hotel for 999 years, at a peppercorn rent, the railway company being authorized by the Act of Parliament to take payment for the land so leased by them, by accepting 6500 shares. During the erection of the hotel in 1865, the hotel company were much pressed for money to enable them to pay the instalments due to the contractors, and they accordingly applied to the railway company for assistance.

The directors of the railway company, to whom it was an object

to have their station offices completed, agreed to do what they could to assist the hotel company; and accordingly, at a special general meeting of the railway company, held on the 31st of August, 1865, the following resolution was passed by their proprietors, namely, that in order to enable the station works at *Cannon Street* to be at once proceeded with, "the directors be and they are hereby authorized to advance to the hotel company, by way of temporary loan, on the security of the hotel company's shares, or such other security of that company as the directors may think fit, the sum of not exceeding £40,000, such loan not to extend beyond a period of two years, to bear interest at the rate of 6 per cent. per annum and to be subject to such conditions and stipulations as the directors may deem requisite."

On the same day there was a meeting of the hotel company, and the result of the proceedings was that the railway company were to lend the hotel company £40,000, and to take as security 3700 paid-up shares of the company, such shares to be placed in the names of trustees, and to be re-transferred at par by the trustees to such persons as the hotel company might nominate, and the debt to be diminished accordingly.

In accordance with this arrangement, a deed, dated the 5th of October, 1855, was executed between the hotel company and the railway company, and Messrs. *Beattie* and *Warren*, two of the directors of the railway company, in whose names the shares were to be placed. By this deed it was declared that the trustees should hold the shares upon trust to indemnify the railway company against any loss which they might sustain by reason of the advance, and when such shares and interest should have been repaid, upon trust to transfer the said shares, or such of them as should not have been previously disposed of, as the hotel company should direct. The hotel company by the same deed covenanted with the railway company, on or before October, 1867, to repay the principal moneys advanced and interest at £6 per cent. Of the 3700 shares 60 were subsequently disposed of, and the proceeds, amounting to £600, were paid to the railway company.

On the 29th of May, 1869, the hotel property was mortgaged to Messrs. *John & Joshua Fielden*, for £75,000.

Matters remained in this state till January, 1870, when the

V.-C. M. 1872 — *In re* City Terminus Hotel Co. — South Eastern Railway Company's Claim.

railway company, seeing no chance of disposing of any more of the shares standing in Messrs. *Beattie* and *Warren's* names, insisted upon having a second mortgage on the company's property in *Cannon Street*, and this charge was effected by a deed dated the 1st of February, 1870, for £44,941 17*s.* 9*d.*, being the amount of principal and interest due to that date, from the hotel company to the railway company.

The working of the hotel had never since the commencement resulted in a profit to the shareholders; and the directors, at the latter end of the year 1870, finding that their losses were gradually increasing, resolved to take steps to wind up the company.

By an Act passed in 1870 the railway company obtained power to purchase the hotel, and in the month of December, 1870, an agreement was entered into between the railway company and the hotel company, by which the amount of the purchase-money was to be settled by arbitration. On the 14th of March, 1871, the arbitrator appointed under this agreement made his award, which amounted to £201,500. The directors afterwards called a special meeting of the hotel company, and a resolution was passed that the company should be wound up voluntarily, and the directors were appointed liquidators.

The directors, out of moneys in their hands and moneys advanced to them by the railway company on account of purchase-money for the hotel undertaking, then paid most of the simple contract debts of the concern, and the liquidation was being proceeded with when a shareholder, Mr. *Apps*, having raised the question now brought before the Court, the liquidators thought it right to go to the Court to have that point decided, and accordingly presented a petition for continuing the voluntary liquidation under the supervision of the Court, and an order to that effect was made.

The question raised was, whether the railway company were entitled to be treated as creditors in respect of their mortgage of 1870, or whether Messrs. *Beattie & Warren*, to whom the 3640 shares were transferred, ought to be treated as contributories, and so only receive the same proportion of the purchase-money in respect of the shares transferred to them as the general body of shareholders. With the view of settling the question, the present summons was taken out by the railway company for an order that out of the

balance remaining unpaid of the purchase-money payable by the company in respect of its purchase from the hotel company, the railway company might be at liberty to pay off the sum due to Messrs. *Fielden* upon their mortgage, and to retain the sum due to itself upon its own security, and that the hotel company and its liquidators might be directed, on payment of the remainder of the purchase-money and interest, to concur with all necessary and proper parties in executing a proper surrender to the railway company of the lease of the hotel, and that the costs of the application might be paid out of the assets of the hotel company.

Mr. *Phear*, for the railway company:—

The only question now is whether the railway company are to be treated as shareholders for these shares, or whether they are creditors for the amount. There is no doubt that the railway company were desirous that the hotel company should complete their building, since it formed part of their terminus. They were consequently willing to assist the hotel company by lending them money upon such security as they could give. The hotel company having 3700 shares which they had been unable to dispose of, proposed these shares as a security, and the railway company accepted the security. The shares were consequently assigned to trustees for the railway company. It was simply a loan from one company to another. The two companies, though having a joint interest in the success of the undertaking, and though some of the directors and shareholders in one company were also directors and shareholders in the other, were perfectly distinct companies. The security might not have been sufficient to satisfy every lender of money, but it was the best that the hotel company could offer and that the railway company could obtain, and both companies acted as they thought best for the interest of their shareholders in effecting the arrangement. The shares might have turned out to be more valuable, and the hotel company might then have demanded a re-transfer, but, as it happens, the project has not hitherto been successful, and the shares have continued unsold. Still the transaction remains the same, a loan of money upon the security of the shares; and the railway company are now entitled to stand as creditors in the winding-up

V.-C. M. 1872

In re City Terminus Hotel Co.

South Eastern Railway Company's Claim.

for the amount of the loan, and to deduct the money advanced from the amount of the purchase-money.

Mr. *Glasse*, Q.C., and Mr. *Caldecott*, for Mr. *Apps* :—

These two companies were to all intents and purposes one company. The directors and shareholders were so mixed up together that it is impossible to say they were separate companies. They had a joint interest, and the hotel speculation was a joint concern. These shares were in effect issued to the railway company, and placed in the hands of trustees so as to make the railway company *cestuis que trust* of the shares. The transaction was *ultrà vires* on the part of the hotel company. The shares were allotted to the railway company, and they must still be considered as shareholders and must come in in the winding-up and take only a *pro ratâ* dividend of the purchase-money jointly with the other shareholders of the hotel company.

Mr. *Higgins*, Q.C., appeared for the liquidators of the hotel company.

Mr. *Stallard*, for thirty-nine of the shareholders.

Sir R. Malins, V.C. :—

It seems to me that the matter is reasonably clear. The *South Eastern Railway Company* being desirous that a large hotel should be erected in *Cannon Street*, in connection with their terminus there, a separate company was formed, emanating no doubt very much from the proprietors of the *South Eastern Railway Company*, many of the directors of the one company being directors of the other company. But still it is a totally independent company. The *South Eastern Railway Company*, like all other railway companies, is constituted by Act of Parliament, the hotel company was constituted by memorandum and articles of association, duly registered under the Act of 1862, containing such provisions as were thought necessary for its regulation. In the progress of the works, that happened, which is not very unusual in such matters, the hotel company found themselves short of funds to complete the hotel. It has not been stated how much it cost, but I gather that the sum was between £200,000 and £300,000, because ulti-

mately, not being very successful, it is bought by the *South Eastern Railway Company*, under the powers of an Act of Parliament, for £201,500. The company being in difficulties for want of funds to complete, apply to the *South Eastern Railway Company*. It was a great object with the railway company, as is admitted, that the hotel should be completed, and they had more than an ordinary inducement to become lenders. They therefore made up their minds to accede to the application to lend to the hotel company £40,000. The borrowing of the £40,000 was strictly within the powers of the hotel company, because the 74th article of the articles of association provides that, "The directors may from time to time, without any further authority than a resolution of the Board, borrow for the purposes of the company such sum or sums of money as they may think proper, so as no more than the sum of £50,000, to be raised under such authority, be owing as principal money at any one time," and under the sanction of a general meeting, they might borrow further sums. Then the 77th clause provides that "The directors may from time to time, and on such terms and conditions as they shall think advisable, make and enter into such purchases, contracts, and agreements, as they may think fit." Now I think it was open to the railway company, under such circumstances, to get any security they could. The great object of the hotel company was to get the money, the great object of the railway company was that the hotel should be completed. The hotel company happened to have 3700 unissued shares. Nobody could say at that time whether these shares, like any other shares, might not become very valuable; everyone knows how valuable the shares in some of the hotel companies now are, and it might have been the case with this hotel. Nobody could have said in 1865, that the shares would not have risen to a premium. Therefore the hotel company, having to offer by way of security 3700 unissued shares, they were put in the name of two trustees for the railway company, and held in trust to indemnify the railway company; and the trustees were from time to time to sell and dispose of the shares or any part of them, and the money arising from the sale was to be paid in liquidation of the debt, and no doubt if all parties had thought it beneficial that the shares should have been sold at the market price of the day, whatever

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that was, sold they would have been. However, the shares were not sold, but retained. The shareholders in the hotel company had very distinct notice of this, because I find in the balance-sheet of 1868 a statement showing that fact, and it is repeated in every balance-sheet in 1869, 1870, and 1871. In 1870 the shares are stated to have been reassigned to the chairman, but the balance-sheet made up to the 31st of March, 1868, is this: "3640 shares" (60 of them had been sold) "held by the *South Eastern Railway Company* as security for advance of £36,400." I can see nothing illegal, nothing improper, nothing beyond the powers of the company in this. The result was that the railway company bought the hotel for £201,500. In my opinion it is clear that out of that £201,500 they are entitled to be paid, in other words, they are entitled to retain out of that money, the £40,000 which they lent. But it was argued on behalf of Mr. *Apps*, and that argument is supported by the official liquidator, that the result of this transaction was, that the railway company became the holders of the shares. That would have defeated every object the parties had in the transaction. It might have been, in another state of things, exceedingly disadvantageous to the hotel company that the railway company should have been holders of shares. If they had risen to 50 per cent. premium, the hotel company would have been reluctant to allow the railway company to have the advantage of that. I am clearly of opinion that it was within the powers of the directors to raise the money, and within their proper discretion to execute a deed of this character, which could not prejudice the hotel company, because it gave the most ample powers of selling the shares from day to day, if the parties thought it expedient.

I am of opinion that the contention raised by Mr. *Apps* is wholly unsustainable, and that the railway company must be treated as creditors, and not as shareholders in any way whatever. The proper course will be to assign the shares back to Mr. *Byng*, as chairman of the hotel company, and they can do what they like with them.

The railway company will be at liberty to retain the amount remaining due to them of their debt out of the purchase-money.

Solicitors: Mr. *Cearns;* Messrs. *Edmands & Mayhew;* Mr. *H. Toogood;* Mr. *G. Aldham*.

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Petition—Charity—Information—Fund raised by Subscription—Interest of Petitioner in Charitable Fund—Opposition of Attorney-General—Original Purpose of Fund.

Where a charitable fund has, on the object for which it was provided becoming incapable of being carried out, been applied *cy-près* to an object in itself beneficial, the Court will not subsequently change the application, even to a purpose identical with its original object, unless satisfied that the proposed application will be as beneficial as the existing one.

Semble, that when a scheme has been once settled for the application of a charitable fund, an alteration in it can only be made on the application of the Attorney-General, or at all events with his consent.

A fund was subscribed for the purpose of providing a place of public worship in *London* for persons coming from the Highlands of *Scotland* who could not speak English, where Divine Service should be performed in the Gaelic language:—

Held, that persons who could not speak the English language in such manner as to enable them to attend with advantage a place of public worship where the English language was spoken were objects of the charity. But the fund having been applied *cy-près* to the purposes of the *Caledonian Asylum* under a scheme settled in an information in consequence of the impossibility of finding a minister to conduct the service in the Gaelic language, or a sufficient number of persons to attend such services, although it now appeared on a Petition by some natives of the Highlands of *Scotland*, who alleged that they desired to attend a service in the Gaelic language, that a duly qualified Scotch clergyman could be found to conduct the service, the Court, not being satisfied upon the evidence that there were persons in *London* who were properly objects of the charity, or would attend the service if established, refused to alter the existing scheme.

THIS was a Petition presented in an information under the following circumstances:—

In the year 1809 a subscription was opened for the purpose of providing a place of public worship in *London* for persons coming from the Highlands of *Scotland* who could not speak English, where Divine Service should be performed in the Gaelic language. In the year 1812 the subscribers appointed a committee, who, on the 16th of March, 1813, entered into a contract for the purchase of a chapel at *Hatton Garden, Holborn*, and applied the subscribed fund, which amounted to £2790 17*s.* 3*d.*, towards payment of the

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purchase-money; but there remained a deficiency, which in 1816 amounted, together with interest, to £1671 19*s.*; and in that year the subscribers agreed to transfer their interest in the chapel to the *Caledonian Asylum*, in consideration of their discharging the debt due upon it. This arrangement was carried out by a deed of the 16th of September, 1816, by which the *Caledonian Asylum* undertook to provide a chapel and a regularly licensed clergyman of the Established Church of *Scotland*, who should every Sunday deliver one discourse in Gaelic and one in English.

In this manner a Gaelic service was for some years provided, and in the year 1822 the arrangement with the *Caledonian Asylum* was confirmed by an Act of Parliament of the 3rd Geo. 4, by which it was, amongst other things, provided, that if the asylum should set apart £2200 to be applied to the purposes for which the subscriptions were raised, the chapel should remain and be to the use of the asylum; and the Act also contained provisions for the sale of the chapel in case of the non-payment of the £2200. This sum of £2200, and a further sum of £590 subsequently subscribed, were accordingly set apart by the asylum for the purposes of the fund and invested.

On the 10th of March, 1827, the information of *Attorney-General* v. *Stewart* was filed against the trustees in whose name the fund was invested, and by the decree it was referred to the Master to approve of a scheme for the application of the fund to the purpose for which the same was subscribed, or as near thereto as circumstances would admit; and by an order in the information of the 11th of June, 1830, made in pursuance of the Master's report, the dividends on the fund were directed to be paid to the Rev. *John Lees*, a Scotch clergyman, for the performance of a Gaelic service on Sunday afternoons.

In August, 1844, Mr. *Lees* resigned, and no other person being found to succeed him, the matter was, by an order of the 30th of May, 1845, referred again to the Master to settle a fresh scheme. The Master, by his report dated the 17th of June, 1846, found, amongst other things, that it did not appear from past experience that Gaelic preaching was required or desired in *London*, and that there were very few persons in *England* who then spoke or understood Gaelic so as to induce them to attend to hear Divine Service

in that language; and that the *Caledonian Asylum*, which was incorporated in the year 1815 for supporting and educating the children of soldiers, sailors, and marines, natives of *Scotland*, who had died or been disabled in the service of their country, and of indigent Scotch parents resident in *London* not entitled to parochial relief, formerly received only boys, but the charity had since been extended, and there were then thirty-four girls, and plenty of room and accommodation for more, and it would be very desirable that the dividends on the fund should be applied in aid of the *Caledonian Asylum* and the extension of its charity, under which the children of natives of *Scotland* were strictly educated in the religion of the Scotch Church; and he approved of a new scheme accordingly. By an order of the 26th of June, 1846, the Master's report was confirmed, and the dividends on the fund had been subsequently applied to the purposes of the *Caledonian Asylum*, in accordance with the scheme.

The present Petition was presented under Sir *S. Romilly's Act*, by certain persons, natives of the Highlands of *Scotland*, one of whom had recently obtained an order appointing him relator in the information in the place of the former relators, who were dead. It stated that a clergyman of the Church of *Scotland* had now been found to perform Divine Service in the Gaelic language, and that there were now a considerable number of Highlanders living in *London* speaking the Gaelic language, to whom Divine Service performed in the Gaelic language would be a great benefit, and who were desirous of attending such services, and would attend them if they had the opportunity; and the Petition prayed that the dividends on the fund should be paid to the Rev. *David Reid*, who was one of the clergymen who had signified his willingness to perform the Gaelic service, for the performance of such service; and that a scheme might be settled to provide for the performance of such services.

The Petitioners brought forward evidence to shew that there were many persons resident in *London*, more familiar with Gaelic than with English, who were desirous of having the opportunity of attending services according to the rites of the Scotch church in the Gaelic language, but there was no satisfactory evidence that more than a very few persons were likely to attend. All the affi-

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davits were in the English language, and it did not appear that there were any Scotch Highlanders in *London* unacquainted with the English language. The chief supporters of the Petition were persons connected with the Gaelic Society, a society whose main object was the promotion of the study of the literature and history of that language.

The evidence on the part of the *Caledonian Asylum* tended to shew that the scheme proposed by the Petitioners would probably fail, and that there were so many different dialects of Gaelic that a person even imperfectly acquainted with the English language would find less difficulty in understanding it than varieties of the Gaelic to which he was unaccustomed.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Petitioners :—

The object of this Petition is to restore the fund to the purpose for which it was originally designed. The intentions of the subscribers had for the time ceased to be capable of being carried out, and the fund was applied *cy-près*. Now when there are parties desiring its application to its original purpose, and there is sufficient evidence that the original object can be carried out, there is no reason for continuing the *cy-près* application.

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the *Caledonian Asylum* :—

In order to disturb a settled scheme it is necessary to shew, not only that it does not operate beneficially, but that the proposed change will be beneficial: *Attorney-General* v. *Bishop of Worcester* (1). The fund was collected originally for persons who could not speak English, and such persons only are entitled to be Petitioners: *In re Masters, &c., of the Bedford Charity* (2). Here not only are there no such Petitioners, but it is clear, on the evidence, that such persons do not exist in *London*. The application is purely speculative and sentimental; and there being no persons in existence properly the objects of the fund, the Attorney-General is the only party having a right to raise any question as to its application.

Mr. *Hemming*, for the Attorney-General :—

It is at least questionable whether the Petitioners here are really

(1) 9 Hare, 328. (2) 2 Sw. 470.

objects of the original charity. Even if they are, it has never been laid down that every person having an interest in a charity can come to the Court to ask for an alteration of a settled scheme, though the Attorney-General, and perhaps the trustees of the charity, may in certain cases do so: *Attorney-General* v. *Bishop of Worcester* (1). The fact that one of the Petitioners has been appointed relator gives him no *locus standi* to present this Petition, and the fiat of the Attorney-General does not preclude him from opposing the Petition, if, as is the case here, the evidence shews that the prayer ought not to be granted.

Mr. *Cotton*, in reply:—

This is not an application to alter the original application of the fund, but to restore it to its original purpose. When it is once shewn that what the Petition asks is the original object of the fund, and that it is capable of being carried into effect, the restoration to that object is a matter of right.

Sir R. Malins, V.C.:—

This is a Petition presented by three gentlemen who are Scotchmen, and who speak the Gaelic language. The object of the Petition is to obtain an alteration in a scheme settled by the Master and sanctioned by the Court as long ago as the year 1846. The charity fund is one which, according to the statements of the Petition, arose from a subscription, in about the year 1809, by Scotchmen in *England*, and most probably in *London*, for providing a place of worship "for persons coming from the Highlands of *Scotland* who could not speak English," where Divine Service should be performed in the Gaelic language; and the original relators in the information, as well as many other persons, became subscribers, and contributed and paid divers sums of money. Much argument has been addressed to me upon the meaning of the words "coming from the Highlands of *Scotland* who could not speak English." I think those words can hardly be taken in their strict and literal meaning, namely, who could not speak the English language at all, because people could hardly come for any useful purpose to *England* unless to some extent they were

(1) 9 Hare, 328.

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acquainted with the English language. The fair meaning, as I collect, is, that the subscription was to provide a place of worship for those persons who could not speak the English language in such manner as to enable them to attend with advantage a place of public worship where the English language was spoken.

[His Honour then stated and commented upon the facts and the evidence, and continued:—]

These are all the witnesses, and there are none of them whose position in life and occupation do not require them to be intimately acquainted with the English language. No doubt they say that it would be a great gratification and advantage to them to attend a service in the Gaelic language, but I am very much inclined to agree with what Mr. *Glasse* said on the subject, that the application on that ground is purely speculative and sentimental. Something more is required than that the applicants cannot have all the advantage which they would desire to have by attending an English service at a Scottish church. But I am quite satisfied that they can have every such advantage. Indeed I am not satisfied, on the evidence, that there is a single person, whether a witness or one who supports the application, who cannot derive every advantage from the service of the Scottish Church in the English language which they could derive from it when conducted in the Gaelic language. And supposing it were necessary to re-establish the service, I am satisfied that the income of this fund, which amounts only to £90 a year, is not sufficient to support a chapel and a minister, and that there is no satisfactory evidence that a sufficient addition for the purpose would be made by the subscriptions of those attending the service. I am of opinion that, practically, in a short time the thing would languish as before, and that it would be found that the fund had been taken away from a most valuable charity for an ineffectual attempt to re-establish this, which has at present altogether died out.

Now, as to the technicalities: It is most material, considering that this scheme has been settled and acted upon for a period of twenty-six years, that I should very cautiously interfere with the application of the fund, which is, beyond all doubt, most beneficial, consisting as it does in the education of four, if not five, children in the *Caledonian Asylum*, where they receive a good education, and where assistance

is afterwards provided to put them out in life. It is highly desirable that I should not attempt to change the application, unless I am satisfied that the new application would be as beneficial as that which exists at present. I would read a few passages from the case which has been commented upon of *Attorney-General* v. *Bishop of Worcester* (1). No doubt the principal circumstances of that case are not applicable to this case, and it is therefore only valuable for the general principle laid down by the Vice-Chancellor; and I think the passage read by Mr. *Glasse* completely applicable to this case. The Vice-Chancellor says (2): "But although it is thus, in my opinion, competent to the Attorney-General to apply to the Court for alterations in schemes which have been settled under its directions, it is obvious, I think, that the Court must proceed upon such applications with the utmost possible caution; that what has been done by the Court must not be disturbed, except upon the most substantial grounds and upon the clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the foundation. Incalculable mischief will ensue to all the charities in the kingdom if this rule be not strictly observed, and if the Court ventures in such cases to interfere upon speculative views as to the result of alterations, or in matters of discretion or regulation—matters on which the opinion of each succeeding Attorney-General and of each succeeding Judge may well be permitted to differ. I consider this case as casting upon me the duty of most carefully guarding myself against being led into adopting, in opposition to what has been already settled by the Court, any mere opinions which I may entertain as to what might be more or less beneficial for this charity."

Upon that principle I should not be justified in adopting this application unless distinctly satisfied that the alteration proposed to me would be a beneficial one; whereas, as I have already stated, my opinion upon the result of the evidence is that this new scheme would, in two or three years, fail.

[His Honour then discussed the evidence on the question whether there were any persons who could properly be considered objects of the charity, and continued:—]

(1) 9 Hare, 328. (2) 9 Hare, 361.

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I am of opinion that there are no persons now in *London* who come within the objects of this subscribed fund, namely, who cannot speak the English language, or who are not sufficiently acquainted with English to understand a service conducted in English.

But then there is the other point which was also adverted to, and upon that I am much disposed to adopt the argument which was addressed to me, not only by Mr. *Glasse*, but by Mr. *Hemming* on behalf of the Attorney-General, namely, that when a scheme of this kind has been settled, if it can be altered at all, that can only be done on the application of the Attorney-General, or at all events with the consent of the Attorney-General. Now, Sir *George Turner*, in the same judgment to which I have referred, says (1): "I am not prepared to hold that it is not competent to the Attorney-General in a charity case to call upon the Court to review a scheme which has been settled under its decree, if he is satisfied that the scheme does not operate beneficially for the charity, and thinks that he can satisfy the Court that the interests of the charity can be better promoted by an altered scheme consistent with the foundation, the usage, and the law. In such a case I think that it is not only competent to the Attorney-General, but it is his duty, to apply to the Court for an alteration in the scheme. The Court, as I have already had occasion to observe, constantly alters schemes which have been settled under its decree, as the changes of times and circumstances may require; and I see no reason why it may not equally alter them under such circumstances as I have pointed out. Lord *Cottenham*, in *Attorney-General* v. *Bovill* (2), differing from Lord *Langdale* upon the point, held that he was not precluded by a decree of Sir *William Grant* from doing what might be proper to be done for the due regulation of the charity, and I think that in principle that case governs the present upon the point now under consideration. The Attorney-General, it must be remembered, acts in these cases on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity."

Here I have the Attorney-General, instead of supporting the Petition, coming by his counsel and telling me that he is most strongly opposed to the application.

(1) 9 Hare, 360. (2) 1 Ph. 762.

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On all these grounds my opinion is that the Petition fails. I should be miscarrying in my duty if I were to disturb the well-settled and beneficial scheme sanctioned long ago by this Court, and in opposition to adopt a fanciful and sentimental scheme which would have no satisfactory or practical result.

Then comes the question of costs. Considering that the result of the decision of this Petition, either by me or the Court of Appeal, will be to settle this scheme and to decide permanently whether the *Caledonian Asylum* is entitled to the money, probably, on the whole, the justice of the case will be met by dismissing the Petition without costs, the *Caledonian Asylum* and the Attorney-General having their costs, as between solicitor and client, out of the fund.

Solicitors: Mr. *J. T. Simpson*; Mr. *Day*; Messrs. *Raven & Bradley*.

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WIER *v.* TUCKER.

[1871 W. 66.]

Exception to Answer—Settled Accounts—Partnership Suit—Discovery relevant to Relief prayed.

A suit was instituted by one of two partners against the other, praying for a dissolution of the partnership, and for the usual partnership accounts. The bill set out the partnership deed, which stated that a sum of £6000 had been brought into the business by the Defendant, and alleged that the statement to that effect was erroneous; but there was no prayer that the account as to the £6000 should be opened or the deed set aside. The Defendant by his answer stated that the account, as regarded the £6000, was treated as a settled account at the date of the partnership deed, and he declined to set out the items of which it was composed, and claimed the benefit of his defence as if he had pleaded or demurred:—

Held, on exception to the answer, that the discovery sought as to how the £6000 was made up was not relevant to the relief prayed, and that the Defendant was not bound to answer the whole bill, but might refuse to give the discovery without being required to plead to the bill.

EXCEPTION TO ANSWER.

This was a suit by one of two partners against the other, praying for a dissolution of the partnership and the usual partnership accounts.

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The bill alleged, by paragraphs 1 and 2, that the Plaintiff was in September, 1867, entitled to certain letters patent, and that in the same year he and the Defendant had agreed to become partners for working the same patents. Paragraph 3 stated that by an indenture dated the 26th of November, 1868, and made between the Plaintiff of the one part and the Defendant of the other part, after reciting that the Plaintiff and Defendant were the proprietors of certain patents, and after reciting also that the Plaintiff and the Defendant, in or about the month of September, 1867, agreed to become partners for the purpose of working the said patents, and that they had been acting as such partners since the 1st of October, 1867, it was witnessed that the Plaintiff and Defendant, each for himself, his heirs, executors, and administrators, thereby mutually covenanted and agreed (so far as was material to be therein set forth) as follows.

Then followed the nineteen clauses of the partnership deed, of which that numbered 4 was set out as follows:—

"4. The capital of the said business was stated then to consist of the sum of £6000 brought in by the Defendant, inclusive of interest calculated up to the 1st day of October, 1868. The Defendant was, on or before the 25th day of December, 1869, to bring in the further sum of £2000, and the Plaintiff was also, on or before the 25th day of December, 1869, to bring in the sum of £2000, making the total capital of £10,000 sterling. The said sums of £6000 and £2000 contributed by the Defendant, and the said sum of £2000 contributed by the Plaintiff, were to be placed to their credit respectively in the books of the partnership, and be considered as debts owing to them respectively from the partnership, and bearing interest at the rate of £5 per cent. per annum as to the said sum of £6000 from the 1st day of October, 1868; and as to the said sums of £2000 and £2000 from the time of payment thereof respectively, and the capital thereof should be repayable to them respectively in manner thereinafter provided; and in the meantime the interest thereon should be paid to the said partners respectively by equal quarterly payments on the 1st day of January, the 1st day of April, the 1st day of July, and the 1st day of October, in every year."

The bill, after alleging by paragraph 5 that it was not the fact, as stated in the fourth clause of the said indenture of partnership, that the sum of £6000, either inclusive of interest up to the 1st day of October, 1868, or otherwise, had been brought into partnership by the Defendant at the date of the said indenture of partnership, made certain specific allegations of error.

The prayer was the ordinary one in partnership suits, and did not contain any clause asking that the deed might be set aside or the account as to the £6000 opened.

The Defendant, by paragraphs 6 and 7 of his answer, stated as follows:—

"6. On the 20th day of November, 1868, the capital invested by me in the said partnership was agreed between the Plaintiff and myself to amount to the sum of £6018 11*s.* after examination of upwards of ninety items of cash advances made by me, and of the calculation of the interest thereon from the dates of such advances to the 1st of October, 1868, consisting of a similar number of items; and it was expressly agreed between the Plaintiff and myself that the sum of £6000 should be inserted in the partnership deed as the amount of capital I had at the date thereof advanced, and that the small balance of £18 11*s.*, together with the further interest from the 1st of October (and not from the date of the deed, the 26th of November), should be carried to the account of the further advances I had agreed to make on behalf of the partnership.

"7. Certain accounts or memoranda of accounts shewing the several advances and payments made by me were, on or about the said 20th day of November, 1868, furnished by me to the Plaintiff; and the said accounts or memoranda of accounts were, on or about the said 20th day of November, 1868, duly vouched by me and by the Plaintiff, and the Plaintiff examined them, and was, or expressed himself to be, satisfied with the correctness thereof; and after such examination, the Plaintiff admitted and agreed, without any conditions or stipulations, that the said sum of £6018 11*s.* was the amount properly due to me on account of the said advances; and the said accounts were stated and agreed to and settled between the Plaintiff and me; and we subsequently, on the 26th day of November, executed the said indenture upon the

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footing of the said settled accounts; and the said accounts were just and true, to the best of my knowledge and belief; and the said sum of six thousand and eighteen pounds and eleven shillings was justly due to me on account of the said advances. I would not have executed the said indenture without having the account of my advances ascertained and agreed upon. The Plaintiff had the draft of the deed of partnership in his possession for some time, and, as I believe, he fully considered all its provisions—at all events several alterations were made in it at his suggestion, and he had abundant opportunity of obtaining independent legal advice upon it if he thought fit."

Paragraphs 9 and 12 also stated as follows:—

"9. In a subsequent account made out by or under the direction of the Plaintiff, and handed to me in or about the month of July, 1869, is the following entry in the handwriting of the Plaintiff's clerk:

"'1868. Nov. 20. By amount of disbursements Cash advanced to date as per settlement } £6018 11 0
Less error since discovered 12 6 0
£6006 5 0.'

"12. Under the circumstances aforesaid, I submit to the judgment of this honourable Court that I am not bound to state further or otherwise than as in this my answer appears, when or by what payments or to whom made respectively, or how the said sum of £6018 11s., or the said sum of £6000 stated in the said deed (according to the fact) to have been brought in by me, was made up; but all the said and other particulars do, I believe, appear in the said partnership books and accounts in the possession of the Plaintiff; and I crave leave to refer to the said partnership books when produced to this Court."

The Plaintiff excepted to the answer for not answering the following interrogatory: "What sum or sums of money had at that time been brought into the partnership by the Defendant, and when, and by what payments, and to whom made respectively, and how does the Defendant make up the sum of £6000, alleged to have been brought by him into the said partnership at the date of the said indenture?"

Mr. *Cracknall*, for the Plaintiff:—

This exception is one of principle. The bill sets out the partnership deed, and alleges that the statements in it relating to the capital brought in by the Defendant are incorrect, and the Defendant declines to state how the account is made out. The rule is that a Defendant must either plead to a bill or answer fully. If he attempts to answer the whole bill, he cannot refuse to answer some of the interrogatories. All the cases having a contrary tendency are merely cases of exception to this rule. One class of such cases is represented by *Lockett* v. *Lockett* (1), where a Defendant was not required to answer in a way which would have involved setting out the whole of complicated partnership transactions; but, on the other hand, *Thompson* v. *Dunn* (2) shews to what extent the rule will be carried. There, even where it could not be known till the hearing whether the discovery sought would be of any use, it was required to be given. Another class of exceptions to the rule is represented by *De la Rue* v. *Dickinson* (3), where the accounts sought were such as would be part of the decree if made; *Lett* v. *Parry* (4) was a similar case. On the other hand, the rule is so well settled that it is hardly necessary to refer to such authorities as *Reade* v. *Woodrooffe* (5).

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the Defendant:—

The statement as to the £6000 is not a recital, but is in the witnessing part of the partnership deed, and the bill is not so framed as to allow of a decree to set it aside. The account is, in fact, treated by the deed as a settled account. The Plaintiff has no right to discovery for any purpose which is not required for the relief prayed, and the Court has power, under the present General Orders, to consider the relevancy of the discovery sought to the relief which is asked. On this principle *Lockett* v. *Lockett* was decided, and it clearly covers the present case. *Reade* v. *Woodrooffe* merely stated the strict principles of the old law, but the most recent decisions are in the opposite direction, as, for instance, *Piffard* v. *Beeby* (6).

(1) Law Rep. 4 Ch. 336.
(2) Ibid. 5 Ch. 573.
(3) 3 K. & J. 388.
(4) 1 H. & M. 517.
(5) 24 Beav. 421.
(6) Law Rep. 1 Eq. 623.

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Mr. *Cracknall*, in reply, cited *Chichester* v. *Marquis of Donegal* (1) and *Robson* v. *Flight* (2).

SIR R. MALINS, V.C., after referring to the facts and reading the paragraphs of the answer above set out, continued:—

The case set up by the answer is that of a settled account. But Mr. *Cracknall* says that defence ought to have been raised by plea. This has, however, been done in effect, because the facts relied upon are first stated, and then the Defendant claims the benefit of the defence, as if he had raised it by plea. Independently of that question, however, I am of opinion that the Plaintiff is not, on the present bill, entitled to require this discovery. I think it is a matter of the highest importance that when a settlement of account has been once made it should be maintained, and not allowed to be questioned, except for some definite cause.

Now this is a bill seeking to dissolve a partnership and to take the partnership accounts; and the Plaintiff, though he sets out on the face of his bill the articles of partnership, which treat this sum as an ascertained amount, requires the answer to shew how it was made out. That is to say, having deliberately entered into this partnership on the footing of a settled account, he files this bill, and, without impeaching the partnership articles, asks to have the account taken as if the settlement did not exist.

I am of opinion that the Defendant is entitled to treat the 4th clause of the partnership deed as final and conclusive, unless it is impeached on the ground of fraud, or something similar. I am of opinion that the discovery sought is not relevant to the relief prayed, and that on the authority of *Lockett* v. *Lockett* (3) the Plaintiff is not entitled to this discovery. It would be in the highest degree unjust to allow the Plaintiff, on his present bill, to open these accounts. The exception will therefore be overruled with costs. If the Plaintiff desires to impeach the account he must amend his bill.

Solicitors: Mr. *W. Foster*; Mr. *A. Beddall.*

(1) Law Rep. 4 Ch. 416. (2) 33 Beav. 268.
(3) Law Rep. 4 Ch. 336.

In re THOROLD'S SETTLED ESTATE.

V.-C. M.
1872
Feb. 9.

Settled Estate—Interim Investment of Purchase-Money—Leases and Sales of Settled Estates Act—Cash under the Control of the Court—23 & 24 Vict. c. 38, s. 10.

The purchase-money of land sold under the *Settled Estates Act* is cash under the control of the Court for the purpose of investment under General Orders made under the provisions of sect. 10 of the Act of 23 & 24 Vict. c. 38.

22 L J 94

THIS was a Petition under the *Leases and Sales of Settled Estates Act*, praying that an estate might be sold, and that the proceeds of the sale might be invested in the same manner as cash under the control of the Court is allowed to be invested under the provisions of the General Order of the 1st of February, 1861, rule 1.

The order was made according to the prayer of the Petition, but the Registrar, in drawing it up, inserted the direction for investment according to the terms of sect. 25 of the *Leases and Sales of Settled Estates Act.*

Mr. *Freeling*, for the Petitioner:—

The Master of the Rolls, in *In re Cook's Settled Estates* (1), following *In re Wilkinson's Estate* (2), directed an investment to be made under the General Order; but the difficulty has arisen from the fact that in a more recent matter, of *In re Shaw's Settled Estates* (3), which came before him on the 8th of December, 1871, he refused to follow his decision in *In re Cook's Settled Estates*, and directed an investment in accordance with the terms of the *Settled Estates Act.*

SIR R. MALINS, V.C.:—

The Act of 23 & 24 Vict. c. 38, by sect. 10, expressly empowers the investment, in accordance with General Orders, to be made of all cash under the control of the Court. I am at a loss to imagine from what possible reason it can be supposed that cash paid in under the *Settled Estates Act* is not cash under the control of the Court.

(1) Law Rep. 12 Eq. 12. (2) Law Rep. 9 Eq. 343.
(3) *Ante*, p. 9.

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Mr. *Freeling* then proposed that the investment should be made in *East India* 4 per Cent. Stock, and the order was directed to be drawn up accordingly.

Solicitors: Messrs. *G. L. P. Eyre & Co.*

V.-C. M. 1872 — *March* 12.

WILSON *v.* WILSON.

[1869 W. 253.]

Mortgage of a Ship—Assignment of Freight—Priority—Notice.

The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him.

The owner of a ship assigned the freight not yet earned, and, three days afterwards, with the knowledge of the assignee, mortgaged the ship to the Defendants, who registered their mortgage. The assignee neglected to give notice of his claim upon the freight to the mortgagees:—

Held, that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees.

In May, 1866, *Joseph Wilson*, who was a merchant at *Liverpool*, was the owner of a ship called the *Kenilworth*, which was then on a voyage from *Liverpool* to *Calcutta*. The Plaintiff, *Mary Wilson*, the mother of *Joseph Wilson*, was at the same time owner of twenty-four 64th shares in the ship *Refuge*.

Joseph Wilson, being indebted to the *Union Bank of Liverpool* for advances made to him, executed a mortgage to the bank dated the 15th of May, 1866, of the ship *Kenilworth* in the form prescribed by the *Merchant Shipping Acts*, and duly registered on the 18th.

On the same 15th of May, the Plaintiff, *Mary Wilson*, at the request of *Joseph Wilson*, executed to the bank a mortgage of her twenty-four 64th shares in the ship *Refuge*, as a further or collateral security for the repayment by *Joseph Wilson* to the bank of the moneys advanced by them to him.

Neither of these mortgages expressly mentioned freight.

On the 12th of May, three days before the date of these mortgage securities, *Joseph Wilson* executed to the Plaintiff, *Mary Wilson*, an assignment of the freight and earnings of the ship *Kenilworth*, by which, "in consideration of *Mary Wilson* granting a mortgage on twenty-four 64th shares in the ship *Refuge*, of which she was the owner, and also of such proportion of her net freight and earnings on her present voyage from *Madras* to *Liverpool*, unto the *Liverpool Union Bank*, being for their better security and due payment of certain bills of exchange then running and discounted for *Joseph Wilson*, trading under the style and title of *J. & R. Wilson*, of *Liverpool*, and also for the balance of his account owing to the *Union Bank*, the said *Joseph Wilson* thereby assigned, transferred, and made over all his right, title, and interest in all the freight and earnings of the ship *Kenilworth*, of *Liverpool*, 860 tons per register, owned by him, and free from mortgage or incumbrances, then on her voyage from *Liverpool* to *Calcutta*, and also in all succeeding or intermediate voyages that she might make, for the benefit and security of Mrs. *Mary Wilson*, and for the due cancelling of the aforesaid mortgage free from incumbrances to her; also for all losses, costs, and charges that she might incur or be put to through the recovery of her property in granting such mortgage."

In an affidavit made by *Joseph Wilson* it was stated that, "shortly after the last-mentioned assignment," the bank requested him to include in their security the freight of the *Kenilworth*, and he then replied that it had already been assigned before the mortgage to the bank was made. This statement was contradicted by other witnesses, who denied that any notice was given to the bank of the prior assignment of freight, and it appeared that it was not at any rate given before the 16th of May.

On the 19th of June, 1866, *Joseph Wilson* executed a deed for the benefit of his creditors, and all his real and personal estate was now vested in the Defendant, *Peter Joynson*, as trustee of such deed.

The Plaintiff, *Mary Wilson*, with a view to protect her interests in the freight and earnings of the ship *Kenilworth*, sent letters to the captain of the ship instructing him to dispose of the cargo and

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receive the freight on her behalf. These letters did not reach the captain until the arrival of the ship in the port of *Marseilles;* but the agent of the bank had, two days before, while the vessel was ashore off the mouth of the *Rhone,* caused a letter to be delivered to the captain, claiming possession of the ship and freight on behalf of the bank. The same agent had also, before the arrival of the ship in port, given notice to the consignee of the cargo that the freight was to be paid to him on behalf of the bank. By a subsequent arrangement, however, between the Plaintiff and *Joseph Wilson* and the bank, the cargo was sold, and the freight was received by the bank, to be accounted for according to the rights of the parties.

The bill was filed by *Mary Wilson* against the bank, for an account of all moneys received by them in respect of the freight, earnings, and cargo of the ship *Kenilworth,* and praying that the bank might be ordered to pay to the Plaintiff out of such moneys so much as should be equal to the value of the twenty-four 64th shares in the ship *Refuge,* and the freight thereof, together with interest thereon.

Mr. *Glasse,* Q.C., and Mr. *Wintle,* for the Plaintiff:—

The contest in this case respects the homeward freight of the ship *Kenilworth,* and the question is, whether the mortgagee of the ship, or the assignee of the freight, whose assignment was executed prior to the mortgage, is entitled to that homeward freight.

At the time of the mortgage the ship was chartered to carry goods from *Liverpool* to *Calcutta;* and as these goods belonged to the owner himself, there is no question about the freight to *Calcutta.* On the 12th of May, 1866, *Joseph Wilson,* as such owner, executed the assignment of the freight and earnings of the *Kenilworth* to his mother, by way of security to her for having given a collateral security to the bank upon the shares she then held in another ship, the *Refuge,* for advances made by the bank to her son. *Joseph Wilson* had full power to execute this assignment of the freight, independently of the vessel itself. Three days after this assignment he effected a mortgage of the ship to the bankers, but this mortgage did not include the freight and earnings of the vessel. The mortgage was in the form prescribed by the *Merchant*

Shipping Act, 17 & 18 Vict. c. 104; and in that form, which is attached to the Act, there is no mention of freight, consequently the freight did not pass; and as the assignment of the freight was prior to the mortgage, the bank can have no right to such freight as against the assignee. The mortgage could only affect the interest which the owner of the ship had; and at the date of the mortgage the freight of the ship was not his to mortgage, and the mortgage of a ship does not carry the freight as against an assignee for value.

There is evidence that notice of this assignment to the Plaintiff was given to the mortgagees, and the circumstances of this case bring it within the authority of *Douglas* v. *Russell* (1), where *A.*, a shipowner, assigned to *B.* the freight earned and to be earned by one of his ships, and afterwards chartered her to *C.* for a voyage. The outward freight had been paid to *A.* before the ship sailed. The charterparty was afterwards delivered to *B.* by *A.*'s directions, and *B.* gave notice of the assignment to *C.* Before the ship returned *A.* became bankrupt, and it was held that the homeward freight was not in *A.*'s order and disposition at his bankruptcy, and therefore that *B.* was entitled to it. By the assignment of the freight the assignor constituted himself a trustee for the assignee, and he had no power afterwards to mortgage it: *Holroyd* v. *Marshall* (2). In *Lindsay* v. *Gibbs* (3) the right of a part owner of a ship to assign his interest in the freight was admitted, and no notice of the assignment was given in that case to the co-owners, though the co-owners were held to be entitled to deduct from the freight a proportionate part of the expense of insuring the vessel.

Brown v. *Tanner* (4) and *Rusden* v. *Pope* (5) shew that, to entitle the mortgagee to freight, the ship must have been working for him, and must have been earning freight whilst it was in his possession. In *Chinnery* v. *Blackburne* (6), where possession was not taken by the mortgagee till after the voyage was completed, it was held that freight earned in that voyage, though after the mortgage, could not be recovered by the mortgagee.

The mortgagee of a ship takes possession subject to all equities

(1) 4 Sim. 524.
(2) 10 H. L. C. 191.
(3) 22 Beav. 522; 3 De G. & J. 690.
(4) Law Rep. 3 Ch. 597.
(5) Ibid. 3 Ex. 269.
(6) 1 H. Bl. 117, n.

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then subsisting. This was decided in *Collins* v. *Lamport* (1), where it was held that the analogy of leases made by a mortgagor of real estate did not apply to mortgages of ships, and that the mortgagee took possession subject to contracts made by the mortgagor. The mortgagor of a ship remains owner under the *Merchant Shipping Act* (17 & 18 Vict. c. 104, s. 70) till possession has been taken by the mortgagee, and therefore a security on the earnings given before possession is taken is good against the mortgagee.

[They also cited *Boss* v. *Hopkinson* (2), *Webster* v. *Webster* (3), and *Feltham* v. *Clark* (4), to shew that the incumbrances must take effect according to the order of their date; and *Reeve* v. *Whitmore* (5), that a license to seize after-acquired chattels without an assigment or contract for the assignment of the same does not operate as an equitable assignment of such chattels, or give the assignee any interest therein until actual seizure.]

Mr. *Cotton*, Q.C., and Mr. *Gunning Moore*, for the Defendants:—

It is not disputed that the future freight of a ship to be earned is the subject of assignment, but the question is, whether such assignment is good against the mortgagee of the ship, who has no notice of the assignment. If the Court is satisfied that no notice is made out, then the Plaintiff must fall back upon the right of the owner of a ship to assign the freight independently of the ship. We contend that the mortgage of a ship carries with it the freight earned by that ship, just as much as a mortgage of land carries with it the right to receive the rents of the land; and although a mortgagor may receive the rents until the mortgagee asserts his right, still he may assert that right whenever he pleases, and may take possession of the rents. There is the same right in the mortgagee of a ship to receive the earnings of the vessel upon giving notice that he intends to exercise his right to do so, either to the mortgagor or to the charterer or the consignee of the goods. It was laid down in *Brown* v. *Tanner* (6) by the present Lord Chancellor, when Lord Justice, that it was settled beyond dispute that the mortgagee of a ship became entitled to all the rights of

(1) 13 W. R. 283.
(2) 18 W. R. 725.
(3) 31 Beav. 393.
(4) 1 De G. & Sm. 307.
(5) 3 N. R. 15.
(6) Law Rep. 3 Ch. 597.

an owner from the time of his taking possession, including the right of receiving all freight remaining due when possession is taken. It was further established by that case that a mortgagor, having effected a charterparty, had no power to assign the freight to another person before it became due, so as to prevent the mortgagee of the ship, on taking possession before the freight is due, from receiving it, as that would deprive the mortgagee of the whole benefit of his security, because the ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee. It was held in *Rusden* v. *Pope* (1), and in *Kerswill* v. *Bishop* (2), that the effect of a mortgage of a ship under a contract for earning freight was to transfer the freight to the mortgagee. The case of *Lindsay* v. *Gibbs* (3) turned upon the omission of the mortgagee to register, and the question was whether the right to the freight was in the mortgagor or the mortgagee till registered; but here the mortgage was registered, and therefore the case does not apply.

The only remaining question therefore is, whether possession was taken by this mortgagee; and we prove that an agent of the mortgagee went on board before the arrival of the ship at *Marseilles*, and actually took possession before the vessel came into port. The mortgagee had a right to claim the freight at any time before the money was paid, and this was done in the most effectual manner. We say also that the Plaintiff gave no notice of her assignment to the bank, but allowed them to suppose they were getting the full rights of a mortgagee, and therefore she cannot be allowed to set up this claim.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

The point which I have to decide is probably one of considerable importance on mercantile law, but I cannot state that I feel much doubt about it.

Mary Wilson, a widow lady of *Liverpool*, in the year 1866 had a son, *Joseph Wilson*, who traded as a merchant in that town. He

(1) Law Rep. 3 Ex. 269, 276. (2) 2 C. & J. 529.
(3) 22 Beav. 522; 3 De G. & J. 690

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had dealings with the Defendants, the *Union Bank of Liverpool*. I collect that he was in considerable straits for money, and he therefore applied to the bank to make him advances upon security. He was the sole owner at the time of a ship named the *Kenilworth*, which was upon her outward voyage to *Calcutta*. His mother, the Plaintiff, was part owner of another ship called the *Refuge*. In order to improve the position of the bank, and to induce them to make more advances to *Joseph Wilson* than they would otherwise have done, he applied to his mother to give them, by way of collateral security, as the bill sets out, her interest in the ship named the *Refuge*. Now that collateral security, I suppose, meant a security in addition to the security upon the ship *Kenilworth*. The Plaintiff does not admit that she knew the fact of the ship *Kenilworth* being mortgaged to the bank, but I am bound to say I think there is very little doubt of the fact, and no doubt that her agent knew it. It appears that on the 15th of May, 1866, *Joseph Wilson*, being the sole owner of the *Kenilworth*, mortgaged it in the usual way to the bank as a security for whatever might become due from him to them. That mortgage, of course, would not be available without registration; but it is stated by the answer that it was duly registered, and it is not disputed that the date of the registration was the 18th of May, three days after the mortgage. On the 18th of May, therefore, at all events, the bank had a complete mortgage on the ship *Kenilworth*, but, on the 12th of May, before that mortgage, the Plaintiff, Mrs. *Wilson*, had taken from her son an instrument in this form:—[This instrument is already set forth]. This gave her in the most ample manner the freight to be earned by the *Kenilworth*. There is no dispute between the parties,—at least the bank do not raise any question as to the right of the outward freight from *Liverpool* to *Calcutta*, because it is stated by *Joseph Wilson* that the whole of the cargo belonged to himself, and therefore, being the owner of the ship, and also the owner of the cargo, no freight would have to be paid. Of that fact, I collect, the bank were aware, and they do not set up any claim to the outward freight. But what is in dispute between the parties is the homeward freight, the freight earned by the ship *Kenilworth* on the return voyage from *Calcutta*, not to *Liverpool*, but to *Marseilles*, which was her port of destination on her return

voyage. Is, then, the Plaintiff, as assignee of the freight, or are the Defendants, as mortgagees of the ship, entitled? That freight, like any other property—that is, freight not yet earned—may be the subject of assignment in equity, cannot be disputed, and has not been disputed in this case. Therefore, so far as this question depends on the right of the assignee to the freight, the title of the Plaintiff is perfectly clear, because she had an assignment of it for value, and that assignment would operate on the freight when it was afterwards earned. So far the case is free from any difficulty. But the contest is between the Plaintiff as the assignee of the freight, and the Defendants as mortgagees of the ship.

Before I go to that point, I will dispose of the question whether the Defendants had or had not notice of the deed of the 12th of May, when they took the mortgage of the 15th of May, because if they had notice that the Plaintiff was at that time the assignee of the freight to be earned by the ship, either on the outward voyage or on the homeward voyage, there would be an end of their title, and, consequently, that point has been considerably contested whether they had or had not notice. Now upon that subject, considering all the surrounding circumstances, I think it was the bounden duty of this lady, who, though she may have known nothing about it herself, must be bound by the acts of her agent, to have given notice of it when the collateral security was effected. I can only come to the conclusion that she, or those who were acting for her, did know of the transaction with the bank, and therefore it was their duty to give notice to the bank that, in taking the mortgage of the ship, they were not to have all the ordinary rights of a mortgagee of a ship, but that the freight of the then voyage, that is, whatever the ship might earn before she came back to *France*, or whatever was the port of her return, was already pledged to the Plaintiff. Now, was such notice given or was it not? *Joseph Wilson* is the only witness who proves the fact. Considering the nature of the transaction, I must look on *Joseph Wilson's* evidence with considerable doubt; he was evidently under a bias to do the best he could for his mother after the money was gone; but the fact of that notice having been given is most positively and distinctly denied by the Defendant, *James Wilson*, who was the manager of the bank, and his statement is in effect confirmed by *Joseph*

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Wilson, because the important period as to this notice having been given was on or before the 15th of May, and his statement is that on the 16th he mentioned to Mr. *James Wilson*—but not in a business-like manner—as he came out of the bank that he had already mortgaged the freight. But the 16th was too late, as they had advanced their money on the 15th, or given credit for it. I am therefore satisfied, on the weight of evidence, that no notice whatever of this assignment of freight was given to the bank, and they are therefore in possession as mortgagees of the ship, whatever title that may give them, without any notice whatever of any prior incumbrances on the ship or the freight.

Then what is the position of a mortgagee of a ship? I take it that there is a perfect analogy (and cases have been cited, and very important ones, to that effect) between the mortgagee of land and the mortgagee of a ship. We know perfectly well that a mortgagee of land has a right, from the very day of his mortgage, to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some action on the part of the mortgagee, and the payment of the rents by the tenants to the mortgagor, notwithstanding the mortgage, is perfectly valid and binding. So I take it to be perfectly clear that the mortgagee of a ship, just like the mortgagee of land, has a continuing right to receive all the earnings of a ship, that is, the freight, either under a charterparty or without a charter party, whenever he thinks fit to enter into possession; and if the ship has earned money he has a right, before the goods are delivered in respect of which the money is earned, to give notice to the consignee, the person having to pay the freight, or to the charterer, who may be a perfectly distinct person, and ordinarily is distinct from one who has to receive the goods, that he is a mortgagee, and that he requires the freight to be paid to him.

This is very distinctly laid down in many cases, and all agree upon it; but the case lately decided of *Brown* v. *Tanner* (1) shews

(1) Law Rep. 3 Ch. 597.

it clearly. It is true the question arose there on an assignment of freight subsequent to the mortgage of a ship; but in deciding that case the present Lord Chancellor, then Lord Justice, says: "It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken." In the case in the Court of Exchequer about the right of assignees to receive freight—*Rusden* v. *Pope* (1)—there was a difference of opinion; three of the learned Judges thought one way, and Mr. Baron *Bramwell* thought another way. Mr. Baron *Martin* expresses himself thus: "Now, it has been held for many years, and frequently decided, that the effect of a mortgage of a ship under a contract for earning freight is to transfer the freight to the mortgagee. The freight becomes his property as a chose in action, and the case of *Kerswill* v. *Bishop* (2) is a direct decision to this effect. But in analogy to the case of real property, it is rightly held that, though the mortgagee takes the accruing freight as his property, yet payment to the mortgagor is good payment. If, however, the mortgagee intervenes at any time before payment, he has a right to do so; he asks for his own property."—It is like the rent of land, which is his own property if he chooses to consider it so; and the freight earned by the ship is his own property if he chooses to receive it.—"What entitles him to receive the freight is the communication of the fact that he is mortgagee, and that he claims it as such; and taking possession is only one mode of communicating the fact. I entirely dissent from the proposition that he is entitled because he does any act in earning the freight, for he usually does nothing, and it has been frequently pointed out that his right depends, not on contract, but on property. I think the law on this point is beyond doubt." Mr. Baron *Channell* says: "Now it is true that some cases use the expression that the ship must be earning freight; but I take it to be clear that the freight passes with the assignment of the ship, and though, to enable the mortgagee to establish his right to the freight, it is necessary that he should do some act, yet as soon as he does an act to shew that the mortgagor is not his agent he

(1) Law Rep. 3 Ex. 269. (2) 2 C. & J. 529.

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is immediately entitled to have it paid to him." The Lord Chief Baron also says: "The law is established that the mortgagee of a ship takes at once under his mortgage all the rights of the mortgagor except the right to be paid freight, and to that he is not entitled till he enters into possession, or does something equivalent to it."

The same law is laid down by the Master of the Rolls in the case of *Lindsay* v. *Gibbs* (1), which has been relied upon by Mr. *Glasse* and Mr. *Wintle*, but in which, I confess, I fail to find a single line in the slightest degree favourable to their case. There the question depended upon a gross omission of a mortgagee of a ship to register it. I have already pointed out that before the 18th of May, when the mortgage was registered, there was no valid mortgage; but on the 18th of May it was registered, and then the title of the mortgagee was in every respect complete. In the case of *Lindsay* v. *Gibbs*, it all turned on the omission of the mortgagee to register, the question being whether the right to the freight was in the mortgagee or in the mortgagor till registered. The Master of the Rolls says that those who claimed under the mortgagor before registration were entitled to it, and that the mortgagee could only have a title as from the time he registered his security. The case does not go beyond that. The Master of the Rolls lays down the rule in much the same way as all the other Judges, that the mortgagee of a ship is entitled to the freight.

What, then, was done in this case? The ship was on her homeward voyage. *Joseph Wilson* had failed in the month of June, and compounded with his creditors, and a deed was executed in that month, that is, a month after this security was given. The parties at *Liverpool* knew perfectly well that this ship was about to arrive. *Joseph Wilson*, who was naturally very anxious after this failure to do all he could for his mother to reimburse her the money and the risk which she had incurred for him, sends out an agent to *Marseilles*, writes a great many letters, and the agents at *Liverpool* write. These letters arrive at *Marseilles*, are sent to the consul, and there remain until the captain of the ship comes into *Marseilles* and receives them. But in the meantime the bank were not inactive. They were desirous of realising all they could, and they

(1) 22 Beav. 522.

wrote out to a very active and intelligent agent, who appears to have done his business remarkably well, for he was not satisfied with going on board the ship when she came into port, but he actually sent out, before the ship got into port, an agent who boarded the ship. The ship went ashore—she was stranded in fact—and there she remained two or three days. At length she came into port, and then, for the first time, the captain goes to the Consulate and receives the Plaintiff's letters. But in the meantime, to my mind, it is clear the Defendants had done everything they could possibly have done to take possession of the ship. I do not think it material whether they took possession of the ship or not, because as owners of the ship, being mortgagees of the ship without notice, they had, in my opinion, a clear prior title to the Plaintiff; they had a right at any time, until the money was paid which was owing by the mortgagors, to intercept it and say that money must be paid to us. That was quite sufficient before the money was paid; but it was arranged most reasonably afterwards between the parties that the agent of the bank should receive the money without prejudice to any question, and the money has now been deposited in the bank.

Under these circumstances, it appears to me perfectly clear that the mortgage of the ship, without notice of any assignment of the freight, carries with it the absolute right to receive the freight. It is in vain for the mortgagee of the freight, who has allowed the mortgage of the ship to take place without notice, to set up any claim, and it appears to me in this case the mortgagees, the bank, have done all they possibly could. It is very true that the Master of the Rolls, in the case of *Lindsay* v. *Gibbs* (1), says that where there is a charterparty inquiries should be made and notice should be given. I am rather disposed to think that that is a dangerous doctrine, because the mortgagee of a ship has a right to say, I am going to take the ship; I am going to realise my security; I know nothing of any one whatever besides, for nobody has given me any notice. I am rather disposed to think that if he takes a mortgage of a ship and registers it, he is not bound to make any further inquiries. But, however, the Master of the Rolls says, where he knows there is a charterparty

(1) 22 Beav. 522.

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he should inquire of the charterer whether he has received notice of any incumbrance. That may be so; but it was impossible for these Defendants to do that, because there was no charterparty. The ship was on her outward voyage with a cargo which was solely the property of *Joseph Wilson*. They could not give notice, and had no opportunity of doing so. They knew nothing of the charterer at *Calcutta;* they seem to have done everything they reasonably could, whilst the Plaintiff, unfortunately, by her agent, omitted that very plain duty which devolved upon her, namely, having taken this mortgage of the freight on the 12th of May, she omitted to give notice to the mortgagees of the ship until three days afterwards, although, as I must assume, she knew of the transaction. Under all these circumstances, therefore, I am sorry to be obliged to come to the conclusion that the Plaintiff wholly fails, and consequently that the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Edwards, Layton, & Jaques.*

Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*

HUNTER *v.* BULLOCK.

[1869 H. 258.]

V.-C. B.
1872
March 6.

Will—Legacy—Trust for purpose of Uncertain Amount—Honorary Trust—Good Gift of Residue of Legacy.

Testator devised and bequeathed all his estate and effects upon trust for his niece for her life; and after her death, he bequeathed legacies, and directed that all the residue of his estate should be divided as a mixed fund amongst three residuary legatees. He then desired that his executors should pay to the trustees of a charity a sum of £1000 stock, for the following use, namely, "to pay the required amount for painting and keeping in repair" the gravestone of himself and his niece, for a certain day (his birthday) yearly, "if required," and to pay "the balance that may remain" for the purposes of the charity:—

Held, that the trust to keep in repair the gravestone was honorary only; and hence, though the sum which would be required for that purpose was uncertain in amount, the uncertainty did not render void the gift of the residue of the sum of £1000 stock.

FURTHER CONSIDERATION.

John Hunter, who died on the 12th of October, 1869, by his will, dated the 8th of October preceding, after all his just debts, funeral and testamentary expenses should be paid, devised and bequeathed to two persons, whom he also named executors, "all and everything" he died "possessed of or in expectancy of," upon certain trusts for the benefit of his niece, *Elizabeth Hunter*, during her life. Upon her demise, he bequeathed the sum of £1000 stock, free of legacy duty, to the trustees of the *Benevolent Institution for the Relief of Aged and Infirm Journeyman Tailors*, at *Haverstock Hill, Middlesex*. He gave some other pecuniary legacies, and directed his executors to sell all the freehold and leasehold property in possession at the death of *Elizabeth Hunter*, which, with all property not therein disposed of, he gave and bequeathed in manner therein mentioned. He then gave some other pecuniary legacies, and directed that all the residue and remainder of his estate should be divided between three persons whom he named, as joint residuary legatees. He then desired that his executors would have his own and his niece *Elizabeth Hunter's* "inscription of death" placed on the stone of the grave "at *Kensal Green Cemetery*, provided we

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have been buried there; if elsewhere, to have a stone inscribed placed on the grave; the charge to form part of the funeral expenses." He continued: "I further will and desire that my executors do pay to the trustees of the *Tailors' Institution, Haverstock Hill,* a further sum of £1000 £3 per Cent. Stock, duty free, for the following use, that is, to pay the required amount for painting and keeping in repair the gravestone or gravestones in *Kensal Green Cemetery* or elsewhere, for the 15th day of June yearly, if required, and to divide the balance that may remain into two equal parts," to be divided between the pensioners in the shares and at the dates which he proceeded to mention. It appeared, from a later passage in the will, that the 15th of June was the testator's birthday.

The bill was filed on the 24th of November, 1869, by *Elizabeth Hunter,* against the two executors and trustees, for administration. On the 11th of December, 1869, an administration decree was made, and on the 4th of July, 1871, the Chief Clerk made his certificate, reserving, amongst others, the question of the validity of the second legacy to the *Tailors' Institution,* at the request of the parties, for the opinion of the Court.

By an order dated the 22nd of November, 1871, the trustees of the *Tailors' Institution* obtained leave to attend the proceedings.

One of the questions for decision now was, whether, by reason of the trust to keep the gravestone in repair engrafted on the gift of the second sum of £1000 stock to the *Tailors' Institution,* that gift failed, either wholly or in part.

Mr. *Karslake,* Q.C., and Mr. *Everitt,* for the Plaintiff.

Mr. *D. C. Beale,* for the trustees of the institution:—

There is evidence to shew that the gravestone can be painted and kept in repair at an annual expense of £2; hence the amount of the prior gift, being the capitalized value of £2 a year, is not uncertain; and the residue, being ascertainable, is well given to the institution.

But if the prior gift fails, it is no longer the law that the gift of the residue must fail likewise. In *Fisk* v. *Attorney-General* (1),

(1) Law Rep. 4 Eq. 521, 525.

the Lord Chancellor (then Vice-Chancellor *Wood*) expressly held that *Chapman* v. *Brown* (1) and *Mitford* v. *Reynolds* (2) are practically overruled in this respect by *Magistrates of Dundee* v. *Morris* (3). *Hoare* v. *Osborne* (4), before Vice-Chancellor *Kindersley*, is to the like effect, notwithstanding *Fowler* v. *Fowler* (5).

Mr. *Amphlett*, Q.C., and Mr. *Bailey*, for the residuary legatees:—

The so-called evidence is merely an offer by a workman, which is no evidence at all. It is impossible to ascertain how much will be required, year by year, to keep this gravestone in repair for ever.

The VICE-CHANCELLOR said he could not attend to the so-called evidence.

Mr. *Amphlett*:—If so, the prior gift failing from uncertainty of amount, the gift of the residue fails likewise; and so the whole fails. The only case which can be cited against us is *Fisk* v. *Attorney-General*; (6) but it is an error to suppose that the *Dundee* case is inconsistent with *Chapman* v. *Brown* and *Mitford* v. *Reynolds*. In the *Dundee* case there was no gift of residue after a prior gift unascertainable as to amount. The only point in the *Dundee* case was, that the amount of the gift to the hospital was said to be unascertained; and the House of Lords found that it was ascertainable. *Fowler* v. *Fowler* is undistinguishable.

In *Hoare* v. *Osborne* the rule stated by the learned Vice-Chancellor *Kindersley* (7) is, we submit, not borne out by authority.

Mr. *Bristowe*, Q.C., and Mr. *Charles T. Mitchell*, for the executors and trustees.

SIR JAMES BACON, V.C.:—

I think this question is on the whole plain and free from doubt. The testator, after directing his just debts, funeral and testamentary expenses, to be paid, makes a general devise and bequest of all his estate and effects to trustees, for the benefit of his niece

(1) 6 Ves. 404.
(2) 1 Ph. 185.
(3) 3 Macq. 134.
(4) Law Rep. 1 Eq. 585.
(5) 33 Beav. 616.
(6) Law Rep. 4 Eq. 521.
(7) Law Rep. 1 Eq. 589.

V.-C. B. 1872 HUNTER v. BULLOCK.

for her life. Then, after her death, he gives a legacy of £1000 stock, free of duty, to the *Tailors' Institution*. That is not a specific, but a demonstrative legacy. Then he provides for other things that are to be done after his niece's death. He gives some pecuniary legacies; and directs that "all the residue and remainder" of his estate is to go to three residuary legatees. Now supposing the will to have stopped there, it is quite plain that there is a valid gift of residue, ascertainable in amount, to the persons named. The subsequent gift, if it be a valid gift, is taken out of the residue; it does not otherwise alter the effect of the will in any way.

Then come the words upon which a long argument has been addressed to the Court. Having given directions about his gravestone, the charge for which is to form part of his funeral expenses, the testator proceeds as follows: "I further will and desire":— [His Honour read the words of the clause.] This then is a gift to the institution, with an honorary trust attached, to paint and keep in repair the gravestone for a certain day in every year, "if required."

I think none of the cases touch the present in any way, unless it be the case that was first cited of *Chapman* v. *Brown* (1). But the wording there was, "if any surplus should remain," the same was to go over to the legatee; and it being impossible to ascertain how much it would have been proper to expend in building a chapel, had the object been a legal one, the consequence was, that nothing passed to the legatee. It was considered impossible to ascertain how much would remain after that impossible payment had been made, and so the whole gift was held to be void.

But no such thing occurs here; the gift is certain in amount, subject only to the fulfilment of this honorary trust.

I have no doubt whatever that this second legacy to the *Tailors' Institution* is as good as the first.

Solicitors for the Plaintiff and the Executors: Messrs. *Fielder & Sumner.*

Solicitors for the Institution: Messrs. *Pike & Son.*

Solicitors for the Residuary Legatees: Messrs. *Bailey, Shaw, Smith, & Bailey.*

(1) 6 Ves. 404.

MACKETT *v.* MACKETT.

V.-C. B.
1872
April 16.

[1868 M. 85.]

Will—Construction—Bequest to a Married Woman for Separate Use—Proceeds to be applied to bringing up and Maintenance of Legatee's Children—Absolute Interest.

Testator devised all the rest, residue, and remainder of his real and personal estate to *S. M.*, a married woman, her heirs and assigns, for ever; but upon trust, "as to all the freehold," as he proceeded to declare; "and as to the personal property so given as aforesaid to the said *S. M.*, to and for her own proper use and benefit for ever," separately from her husband, "and the proceeds to be applied by her in the bringing up and maintenance of" all her children.

S. M. died leaving several infant children:—

Held, that she took an absolute interest in the personalty, unaffected by any trust.

20 Sol. 319.
8 Ch D. 541

FURTHER CONSIDERATION.

John Brough, who died on the 25th of January, 1867, by his will, dated the 16th of September, 1861, after giving legacies, bequeathed all the rest, residue, and remainder of his estate, both real and personal, "unto *Sarah Mackett*, the wife of *George Smith Mackett*, and to her heirs and assigns for ever; but upon trust as to all the freehold for the sole and separate use and for the bringing up and maintenance of her son, *John Mackett*, till he attains the age of twenty-one years; then to assign and make over the same to him for his own use and benefit for ever." . . . And as to the personal property so given as aforesaid to the said *Sarah Mackett*, to and for her own proper use and benefit for ever, but not to be subject or liable to the debts, control, or engagements of her present or any future husband; and her receipt alone to be a good and sufficient discharge for the same; and the proceeds to be applied by her in the bringing up and maintenance of the said *John Mackett*, and all other the children of the said *Sarah Mackett*."

The will contained no appointment of executors, and administration with the will annexed was granted to *Sarah Mackett*.

At the testator's death *Sarah Mackett* (who was living separate from her husband) had five children, *Elizabeth*, born the 9th of

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August, 1848; *George*, born in December, 1851; *Mary Wells*, born in November, 1853; *John*, born on the 13th of August, 1861; and *Louisa Ann*, born on the 28th of August, 1863.

On the 23rd of April, 1868, the bill was filed by the infants, *George, Mary Wells, John*, and *Louisa Ann Mackett*, against *Sarah Mackett, George Smith Mackett*, her husband, and *Elizabeth*, the eldest child, then the wife of *William Stockman*, and her husband, praying for administration, for inquiries as to what portion of the testator's personal estate, and of the rents and profits of his real estate, had been received by *Sarah Mackett*, and had been applied to her own use, or otherwise misapplied, and for payment of the amount found due; that the personal estate might be ascertained and invested; that the rents and profits of the real estate might be applied for the maintenance of the Plaintiff, *John Mackett*, and the income of the personal estate for the maintenance of the Plaintiffs and the infant Defendant, and for an injunction and receiver.

On the 8th of May, 1868, a receiver was appointed; on the 18th of March, 1869, an administration decree was made; and in August of the same year Mrs. *Stockman* attained twenty-one.

The Chief Clerk's certificate was made on the 14th of May, 1870.

In June, 1870, *Sarah Mackett* died, having by will, dated the13th of January, 1868, bequeathed the residue (after payment of debts and a legacy of £50) of her real and personal estate, including such as she might become entitled to under the will of *John Brough*, to *Charles Baylis*, upon trust to apply the sum of £300 yearly out of the income of the residuary estate in equal proportions in the maintenance, education, and advancement in life of her children, *Elizabeth Stockman* and *George, Mary Wells*, and *Louisa Ann Mackett*, or the survivors of them, until the youngest survivor, being a son, should attain twenty-one, or being a daughter, should attain that age or marry; and then to convert and invest a portion of the proceeds sufficient to produce an annual income of £75, to be paid to *Elizabeth Stockman* for life for her separate use; and to make a similar provision for the payment of £75 for life to each of her children, *George, Mary Wells*, and *Louisa Ann Mackett*; the annuities to daughters to be for their separate use. She then made a general bequest of her residuary estate, and appointed *Charles Baylis* her sole executor.

On the 15th of June, 1871, *George Smith Mackett* died, having by will, dated the 8th of October, 1870, bequeathed all his property to or in favour of *Mary Wells* and *Louisa Ann Mackett*.

The question now was, as to the testator's personal estate only, whether the bequest to *Sarah Mackett* was absolute, or subject to any charge or trust to maintain the children until the youngest should attain twenty-one or marry, or for any other period.

Mr. *Karslake*, Q.C., and Mr. *Everitt*, for the Plaintiffs, *George* and *John Mackett*:—

The true construction is, that Mrs. *Mackett* took subject to a trust in favour of all the children until the youngest survivor should attain twenty-one, or, being a daughter, marry.

The last authority is *Lambe* v. *Eames* (1), which, however, is distinguishable, the words being, "to be at her disposal in any way she may think best for the benefit of herself and family." Here the words are, "for her own proper use and benefit for ever," separately from her husband, "and the proceeds to be applied by her in the bringing up and maintenance of" the children. Lord Justice *James*, in *Lambe* v. *Eames*, said (2) that it was impossible to execute such a trust as that in this Court. This cannot be said of the present.

In *Carr* v. *Living* (3) the Master of the Rolls said that the principle on which he had always acted was, that although the parent in these cases was a trustee for the children, it was only so far as was required for their maintenance and support; and His Lordship directed a reference to ascertain what was necessary for the purpose.

Mr. *Bristowe*, Q.C., for the infant Plaintiffs, *Mary Wells* and *Louisa Ann Mackett*:—

Since the death of *George Smith Mackett*, the interests of the two infant daughters have, in consequence of his bequest, become adverse to those of the other co-Plaintiffs.

I contend for an absolute interest in Mrs. *Mackett*, unfettered by any trust, precatory or otherwise, in favour of the children. The

(1) Law Rep. 6 Ch. 597. (2) Law Rep. 6 Ch. 600.
(3) 28 Beav. 644.

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reasoning of the decision in *Lambe* v. *Eames* (1) practically decides this case.

Mr. *Kay*, Q.C., and Mr. *Herbert Smith*, for the Defendant *Baylis* :—

We support the same view. There is no binding trust in the will, except the trust for the separate use of *Sarah Mackett*.

In *Thorp* v. *Owen* (2) there was no trust for the separate use of the mother. In *Carr* v. *Living* (3) the Master of the Rolls expressly says that where the children are otherwise provided for, and do not require support or maintenance, they do not receive a portion of the fund.

[They also cited *Macnab* v. *Whitbread* (4); *Webb* v. *Wools* (5); *Kerr* v. *Baroness Clinton* (6); *Wood* v. *Cox* (7); *Byne* v. *Blackburn* (8).]

Mr. *J. Hinde Palmer*, Q.C., and Mr. *C. J. Hill*, for the executors of *George Smith Mackett* :—

We also contend that Mrs. *Mackett* took an absolute interest. When the testator intends to impose a trust, he does so in clear and express terms. All he meant to do, in the case of this bequest, was to shew what his motive was in giving this property to Mrs. *Mackett*.

In *Carr* v. *Living* the gift was for the benefit of the wife and children, who were both placed on a common footing.

[They cited *Fox* v. *Fox* (9), and referred to other authorities collected in *Jarman* on Wills (10); *Howorth* v. *Dewell* (11); *Wilson* v. *Ball* (12).]

Mr. *Amphlett*, Q.C., and Mr. *Freeman*, for Mr. and Mrs. *Stockman* :—

We also contend for an absolute interest; and say that Mrs. *Stockman's* annuity of £75 was bequeathed to her by Mrs. *Mackett*,

(1) Law Rep. 6 Ch. 597.
(2) 2 Hare, 607.
(3) 28 Beav. 644.
(4) 17 Ibid. 299.
(5) 2 Sim. (N. S.) 267.
(6) Law Rep. 8 Eq. 462.
(7) 2 My. & Cr. 684.
(8) 26 Beav. 41.
(9) 27 Ibid. 301.
(10) 3rd Ed. i., pp. 360, *et seq.*
(11) 29 Beav. 18.
(12) Law Rep. 4 Ch. 581.

not in execution of any trust, but under the ordinary testamentary power of disposition.

If, however, it should be held that this is a trust, then we take a share *ultrà* the £75, absolutely: *Bayne* v. *Crowther* (1).

Mr. *Karslake*, in reply.

SIR JAMES BACON, V.C:—

The question, in the first place, is one of construction; and upon that I feel no doubt whatever.

The testator begins with an absolute gift of all the rest, residue, and remainder of his real and personal estate to Mrs. *Mackett*. He then declares trusts of his real estate; but as to his personal estate, he gives it absolutely and without qualification to Mrs. *Mackett* for her sole and separate use. He then adds these words: "and the proceeds to be applied by her in the bringing up and maintenance of" her children. No doubt by these words he expresses the motive of his gift. But he lays no restriction upon the legatee.

In truth, the case resembles that of *Lambe* v. *Eames* (2) in every respect; and the result becomes more clear when one comes to put these words into active operation. If she is not to take the whole absolutely and without qualification, then how much is she to take? If the property is not to be disposed of as she, in her unfettered discretion, shall think fit—if the proportions in which it is to be distributed are not to be regulated by her sole will and discretion—there is no meaning in words. As I read them, they mean only this: "In order to enable her to provide for her children, I give her this property for her own absolute and unfettered use."

The same difficulty occurs here as was suggested in *Lambe* v. *Eames*, where Lord Justice *James* observes upon the uncertainty and impossibility of deciding how much was intended to be spent upon the mother's private purposes, and how much upon the children. Another remark that was made in that case also applies here: "If there be any such obligation, I think it has been fairly discharged by the way in which she has made her will"(3).

(1) 20 Beav. 400. (2) Law Rep. 6 Ch. 597. (3) Law Rep. 6 Ch. 600.

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Here I find that the legatee has in the most express manner carried what may be supposed to have been the intention of the testator into full operation. The gift being to her absolutely, and without condition, she has made a will consistently with that intention, by providing in a particular way for the children.

Under these circumstances, I think it unnecessary to declare that the annuities are confined to the minorities of the infant children, or are payable for any particular period; nor do I think any inquiry necessary as to what is required for the children's maintenance.

The only declaration will be that Mrs. *Mackett* was absolutely entitled, under the will of the testator, to his personal estate.

Solicitors: Messrs *Fielder & Sumner;* Mr. *Charles Baylis.*

V.-C. B. 1872 *April* 16.

In re BASSETT'S ESTATE. PERKINS *v.* FLADGATE.

[1869 B. 215.]

Will—Construction—"I leave to my sister"—Good Gift of Residue—Gift to A.'s three Children held to include a fourth.

JJD. 66

Followed. *In re* STEVENS, DECD. [1952] 1 Ch. 323

A testatrix made a will, which she declared to be her "last will and testament," and thereby appointed an executor, and, after giving legacies, proceeded as follows: "After these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister," *M. P.*, "without any power or control whatsoever of her husband," *J. P.*, "in case of her death to be equally divided amongst her children or grandchildren:"—

Held, a good gift of the residue to the sister.

Bequest to *W.* and *E. B.*'s three children of £10 each, and of furniture equally to be divided amongst them. *W.* and *E. B.* had four children:—

Held, that the four were each entitled to a legacy of £10, and a share of the furniture.

FURTHER CONSIDERATION.

Elizabeth Bassett made her will, dated the 8th of April, 1869, commencing thus:—

"This is the last will and testament of me, *Elizabeth Bassett*, of

8, *Weedington Road,* parish of *St. Pancras;* and I hereby appoint Lieutenant-Colonel *Fladgate,* No. 6, *Queen's Square,* parish of *Westminster,* my sole executor."

She then gave several pecuniary legacies. "To *William* and *Elizabeth Barfoot's* three children" she gave "the sum of £10 each, and all my furniture, goods, and clothing to be equally divided amongst them." She then gave several more pecuniary legacies, and concluded thus:—

"After these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister *Mary Perkins, Pipin Pipin, Wisconsin, North America,* without any power or control whatsoever of her husband, *John Perkins*; in case of her death to be equally divided amongst her children or grandchildren."

An administration summons was taken out by *Mary Perkins* against Colonel *Fladgate,* the executor; and in answer to a decree directing accounts and inquiries, the Chief Clerk, on the 5th of December, 1871, certified that the sole residuary legatee living at the testatrix's death, if the will contained any gift of residuary personal estate, was the late Plaintiff, *Mary Perkins,* who was dead, her personal representatives being *Maria Jane Perkins* and *William Augustus Algernon Perkins;* and that the question whether the will did or did not contain any gift of residuary personalty was reserved for the consideration of the Court.

The suit was afterwards revived by the two personal representatives of Mrs. *Perkins.*

It also appeared that *William* and *Elizabeth Barfoot* had four children living at the testatrix's death; and a further question was, whether all four children could participate in the gift of £10 each, and take a share in the furniture.

Mr. *Kay* Q.C., and Mr. *Nalder,* for the Plaintiffs by revivor:—

The will begins by declaring that to be the testatrix's last will and testament. She then appoints an executor, thereby shewing what she means to leave, namely, all her property, less debts, funeral and testamentary expenses, and legacies.

The words require no addition to determine their meaning. They are sufficient as they stand. To hold otherwise would be

V.-C. B. 1872

In re BASSETT'S ESTATE.

PERKINS *v.* FLADGATE.

not only to bring about an intestacy, but to cause the gift to *Mary Perkins*, who is expressly named, to fail.

Probably the nearest case to this is *Leighton* v. *Bailie* (1); and the rule as to supplying words is laid down in *Hope* v. *Potter* (2).

The Court will probably find little difficulty in including all the children of Mr. and Mrs. *Barfoot*, after the decision in *Spencer* v. *Ward* (3).

On the practice of the Court as to supplying words, the authorities are collected in *Jarman* on Wills (4).

Mr. *Goren*, for the Defendant, the executor.

Mr. *Eddis*, Q.C., and Mr. *Harvey*, for the next of kin:—

No doubt there exist here strong reasons for conjecturing what the testatrix's intention was; the only question is, whether the Court has power to supply the words which are necessary to make a sufficient residuary bequest. She says, "I leave." The question is, what? It is admitted that something must be supplied.

The Court has, no doubt, been able to supply words for the purpose of giving effect to a bequest, where the meaning may be necessarily implied from the words; but in this case the blank after the words "I leave" may be supplied as well by "the sum of £100," or any other sum, as by the "whole of my residuary personal estate."

In *Abbott* v. *Middleton* (5) the rule was established that the Court is not at liberty to introduce words into a will on a "conjectural hypothesis" of a testator's intention (6). The question is, "not what the testator meant, but what is the meaning of his words" (7).

It is only where there is only one thing which the testator could have meant that words can be supplied: *Clarke* v. *Clemmans* (8).

They also cited *James* v. *Shannon* (9); *Miller* v. *Travers* (10); *Buckle* v. *Bristow* (11); *Nunn* v. *Hancock* (12); *Drake* v. *Drake* (13).

(1) 3 My. & K. 267.
(2) 3 K. & J. 206.
(3) Law Rep. 9 Eq. 507.
(4) 3rd Ed. vol. i. 456.
(5) 7 H. L. C. 68.
(6) Ibid. 81.
(7) 7 H. L. C. p. 114.
(8) 36 L. J. (Ch.) 171.
(9) Ir. Law Rep. 2 Eq. 118.
(10) 1 M. & Scott, 342; 8 Bing. 244.
(11) 13 W. R. 68.
(12) 16 Ibid. 818.
(13) 8 H. L. C. 172.

Sir James Bacon, V.C.:—

I should feel the greatest objection to supplying any words in a will; but I do not think this will unintelligible as it stands, and accordingly I do not see the necessity of supplying any words.

I read the will as containing a disposition of the whole of the testatrix's estate and effects. That must have been her intention, as is generally the case, when she set about making her "last will and testament." That would vest the whole of her estate in the executor. Then she gives certain legacies, which it was the duty of the executor to pay. Then she says: "After these legacies . . . are paid, I leave to my sister *Mary Perkins*, . . . without any power or control whatsoever of her husband, *John Perkins;* in case of her death, to be equally divided amongst her children or grandchildren." The intention of the testatrix is express. If I could find any indication of an intention to give anything else, as, for instance, a legacy of £500, it would be different. But what other meaning can be attributed to these words except that which I have suggested? What answer can be given to the question, "What did she mean to leave?" except this—the entirety of the residue of her estate.

Where, then, is the difficulty? No doubt the word "residue" if supplied, would satisfy the meaning; but that only shews that the meaning of the testatrix may be expressed by other words than those which she has used.

The cases which have been cited furnish no rule whatever for the interpretation of the present case. If the whole of the property had been realised and placed on a table, the executor must first have paid out the legacies, and then handed over all the rest to the testatrix's sister.

As to the point about the children, I also have no doubt whatever. Each of the four children must have a legacy of £10, and the furniture must be divided amongst them all.

There will be declarations accordingly; the legacies of infants to be carried to separate accounts, with liberty to apply respecting any of them; the costs of all parties, as between solicitor and client, to come out of the estate.

Solicitors for the Plaintiffs: Messrs. *Fladgate & Co.*
Solicitor for the Defendants: Mr. *J. W. Sykes.*

V.-C. B.
1872
April 23.

HEWITT *v.* JARDINE.

[1869 H. 288.]

Will—Construction—Hotchpot.

Testator gave real and personal property to trustees upon trust to convert, and after the death or second marriage of his wife, to hold the proceeds in trust for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks, and not to the number of the individuals composing the class.

His real estate was to be considered as converted from his death, and it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate in the trust property without bringing the portion so paid in testator's lifetime into hotchpot.

On the marriage of *B.*, one of his daughters, in his lifetime, and before the date of the will, testator covenanted to stand seised of a freehold house to the use of *B.*, her heirs and assigns, for ever. *B.* having died leaving issue:—

Held, that the hotchpot clause could not be extended to the issue of testator's children, so that the value of the house given to *B.* was not to be deducted from the share of her issue who should be living at the death or second marriage of testator's widow.

DAVID JARDINE, by his will, dated the 7th of July, 1862, devised and bequeathed to trustees all his real and personal estate upon trusts for conversion after the death or re-marriage of his wife, who was to be permitted, while she continued his widow, to occupy his business premises, and use and employ any part of the real and personal estate for the purpose of carrying on that or any other business. Subject to these dispositions, the trustees were to sell and convert testator's "personal trust property not consisting of moneys invested," and invest the produce, and permit his wife during her widowhood to receive the net annual income, with directions, in the event of her second marriage, and subject to the preceding directions, "I direct that my trustees shall hold my trust property in trust for my child or children living at the death or second marriage of my said wife, and the issue then living of my child or children dying before that period, such objects to take as tenants in common, according to the stocks and not to the num-

ber of the individuals composing the class." Testator, after directing that his real estate should be considered, for the purpose of enjoyment and transmission under the trusts of his will, as converted into personal estate from his death, declared "that no child to whom or to whose husband I shall have paid any portion in my lifetime shall participate in my said trust property without bringing the portion so paid in my lifetime into hotchpot."

Testator died in March, 1863, leaving his widow and five children surviving.

One of the daughters, Mrs. *Cane*, died in 1867, leaving issue. It appeared that shortly before the marriage of Mrs. *Cane*, in 1849, testator, by deed of the 5th of November, 1849, covenanted and granted that he would stand seised of a dwelling-house therein described to the use of his said daughter, her heirs and assigns, for ever. Mr. and Mrs. *Cane* had been in possession of the house ever since this deed of gift, and an administration suit having been instituted the question arose, upon further consideration, whether the gift of the dwelling-house was a payment by way of portion to Mrs. *Cane*. Two of the testator's children had also been advanced by money gifts during his lifetime.

Mr. *Horton Smith*, for Plaintiffs, the trustees.

Mr. *Swanston*, Q.C., and Mr. *W. R. Ellis*, for the widow and eldest son of the testator:—

The gift of the dwelling-house to Mrs. *Cane* was an advance by the testator in the nature of a portion, and the value must be deducted from the share taken by her issue. The language of the clause, "to whom I have paid any portion in my lifetime," is not confined to a mere money gift, but is applicable to real estate also. The signification of "pay" given in *Richardson's* Dictionary is, "To satisfy or content, by giving an equivalent (in money or otherwise), for something received or bargained for;" and the term has been constantly applied to a render of tithes of corn, cattle, and other things in kind.

Mr. *Kay*, Q.C., and Mr. *Methold*, for the issue of Mrs. *Cane*, contended that the hotchpot clause did not apply and could not be extended to the issue, to whom there was an original substantive

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gift in the event of their parents predeceasing the widow: *Tytherleigh* v. *Harbin* (1); *Langslow* v. *Langslow* (2).

Mr. *Swanston*, in reply:—

In *Tytherleigh* v. *Harbin* no question of hotchpot arose, but simply whether there was a gift to the issue of deceased children of the tenant for life. Here the issue can only take as their parents would have taken, and subject to the same incidents of bringing into hotchpot advances made by the testator.

[He also distinguished *Langslow* v. *Langslow*.]

The VICE-CHANCELLOR held that the children of the testator's daughter, Mrs. *Cane*, who should be living at the death or second marriage of his widow, could not be compelled to bring into hotchpot the value of the freehold property included in the deed of gift of November, 1849, as the hotchpot clause could not be extended so as to include the issue of a child of the testator.

Solicitors: Mr. *J. Lott*; Messrs. *De Jersey & Micklem*; Messrs. *Johnson & Master*.

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MACDONALD *v.* MACDONALD.

[1869 M. 205.]

Indian Succession Act, 1865 (*Act X. of* 1865)—*Will—Moveable and Immoveable Property in India—Scotch Domicil—Charitable Legacy—Marshalling.*

By the *Indian Succession Act*, 1865, succession to the immoveable property in *India* of a deceased person is regulated by the law of *India*, wherever he may have had his domicile at the time of his death; and succession to the moveable property in *India* is regulated by the law of the country of the domicile. By the same Act no man having a nephew, or niece, or nearer relation has power to bequeath "any property" to charitable uses, except by a will executed twelve months before death, and deposited as therein required.

A domiciled Scotchman, possessed of both moveable and immoveable property in *India*, made a will in *Scotland*, appointing both Indian and Scotch executors, and duly executed the same according to the law of both countries. He thereby devised and bequeathed all his Indian property, moveable and

(1) 6 Sim. 329. (2) 21 Beav. 552.

immoveable, to the Indian executors upon trust to sell and realize, and after payment of costs and expenses, out of the free proceeds to pay £10,000 sterling to the Scotch executors, and to pay the residue to legatees. He then directed his Scotch executors to lay out the £10,000 legacy in erecting and maintaining a hospital in *Scotland*. The testator died in *Scotland* a few days after the date of the will, leaving sisters. The moveable and the immoveable property in *India* each exceeded £10,000.

It being in evidence that there is no rule against marshalling in favour of charities known to the law of *Scotland*:—

Held, that the £10,000 might be well paid out of the moveable property only; and that, the distribution of such moveable property being by the law of *India* regulated by the law of *Scotland*, the whole legacy was well given to the charity.

SECOND FURTHER CONSIDERATION.

Kenneth Macleod, a domiciled Scotchman, on the 6th of March, 1869, executed at *Inverness*, in *Scotland*, a document known in the law of *Scotland* as a disposition, and which was, in fact, an assignment in trust of all his property, with directions as to the disposal thereof after his death. This document was executed in the presence of two witnesses, and thus became a duly executed will of property in *India*, according to the *Indian Succession Act*, 1865 (Act X. of 1865).

By this document the testator granted and assigned to *Neil Macleod Macdonald*, *Robert Brown Mackay*, and *Henry Francis Brown*, his whole means and estate of every description, heritable and personal, in *India*, and appointed them his sole executors and administrators so far as his Indian estates were concerned; but in trust that the whole of his said means and estates in *India* should, within twelve months after his death, or as soon thereafter as possible, be realized, and the proceeds disposed of, first, in payment of all debts due "in connection with said means and estate," and the expenses of the management, realization, and disposal of the same; second, that they should, out of the free proceeds, pay and transmit to *John Robertson*, *Alexander Kenneth Mackinnon*, and *Alexander Ranold Macdonald*, the sum of £10,000 sterling, to be disposed of as after directed; and third, the free residue of the proceeds of his Indian means and estates he directed should be divided into ten equal shares as follows: To *Charles Macalister Macdonald* four shares; to *Kenneth Macdonald* one share; to *Keith Norman Macalister Macdonald* one share; to *Neil Macleod*

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Macdonald one share; to *Isabella Robertson* one share; to *A. K. Mackinnon* one share; and to "the managers at the time of my death in charge of the indigo factories upon my Indian estates one share, equally between them."

He then granted and assigned to *Robertson, Mackinnon,* and *A. R. Macdonald,* his whole other lands and heritable estate of every description, as also his whole other moveable means and estate, of whatever kind and wheresoever situated, excepting certain specified lands and estates which he had entailed, and his Indian estates above conveyed; and he appointed the last-mentioned persons executors, except as to his Indian estates. He declared that these directions as regarded the last-mentioned trustees were granted in trust, first for payment of all his just and lawful debts and funeral expenses, and the expenses of executing that trust, in so far as the same were not directed to be paid out of the proceeds of his Indian estates.

He then (after several other directions) directed as follows:—

"And whereas it is my will and desire to found and endow an hospital or charitable institution at *Idenbane,* in the *Isle of Skye,* for the purpose of affording medical treatment and relief to the people of *Skye,* to be called *The Gesto Hospital,* I leave and bequeath for that purpose (first) the said sum of £10,000, which my trustees for my Indian estates are instructed to pay and transmit to my other trustees;" (second) the capital of a sum of £6000, forming part of his Scotch estate, the life interest whereof he had already disposed of; and (third) "the whole residue and remainder of my aforesaid means and estate. And I direct the said special bequests, and also the said residue, to be paid and made over to and in favour of the sheriff substitute of the county of *Inverness,* acting for the *Skye* district of the said county, the heir of entail in possession of the estates of *Grishornish, Orbost, Cushletter,* and *Idenbane,* and the chairman of the parochial board of the parish of *Durinish,* all for the time being, and to and in favour of the said *John Robertson, Alexander Kenneth Mackinnon,* and *Alexander Macdonald,* during their lives, in trust to the end that they apply the same in manner after mentioned, for erecting and maintaining an hospital for the purpose aforesaid."

The testator died in *Scotland* on the 15th of March, 1869, not having been married, and leaving sisters, nephews, and nieces.

The bill was filed on the 29th of July, 1869, and amended on the 11th of October following, and, as amended, was by *Keith, N. M. Macdonald*, one of the legatees of the Indian property, against *Neil M. Macdonald, Brown*, and *Mackay*, the Indian executors, and *Robertson, Mackinnon*, and *A. R. Macdonald*, the Scotch executors, praying for execution of the trusts of the will, in so far as regarded the Indian estate; and (amongst other things) for a declaration that the provision in the will as to remitting £10,000 out of the proceeds of the sale of the Indian property for the purposes of the proposed hospital, was invalid and void, and ought not to be carried out; and that the £10,000 might be declared to form part of the residue of the testator's Indian estates.

In pursuance of directions in a decree of the 29th of January, 1870, the Chief Clerk certified on the 22nd of March, 1871, and with respect to this legacy, found as follows: "The domicil of the testator was Scotch; and, having regard to the laws of *Scotland*, the charitable bequest of £10,000 . . . is a valid charitable bequest. Having regard to the laws of *India*, the said charitable bequest is invalid."

The case came on for further consideration on the 19th of July last, and stood over, on the last-mentioned point, for the purpose of having inquiry as to the respective amounts of the moveable and immoveable property in *India*.

This inquiry having been made, the result was that the moveable estate was found to be of the value of Rs.759,677 2. 6.; and of immoveable, Rs.110,860 (1).

(1) The following portions of the Act and its "Illustrations," were referred to:—

Part II. of the Statute, "Of Domicile," by sect. 5, enacts as follows:

"5. Succession to the immoveable property in British *India* of a person deceased, is regulated by the law of British *India*, wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.

"Law regulating succession to a deceased person's immoveable and moveable property, respectively."

"ILLUSTRATIONS.

"(*b.*) *A.*, an Englishman, having his domicile in *France*, dies in British *India*, and leaves property, both moveable and immoveable, in British *India*. The succession to the moveable property is regulated by the rules which govern in *France*, the succession to

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Mr. *Kay*, Q.C., and Mr. *W. Barber*, for the Plaintiff.

Mr. *Cracknall*, for *James Augustus Stewart*, one of the managers of factories at the testator's death, who had obtained leave to attend:—

From sect. 105 it appears that if this bequest of £10,000 is to be governed by Indian law, the whole bequest must fail; if, on on the other hand, Scotch law is to prevail, then it cannot be contended that the bequest is not a valid bequest: *Preston* v. *Viscount Melville* (1).

A third conclusion to which the Court may possibly arrive is, that the gift being thrown equally upon the mixed fund of moveable and immoveable property, to the extent of the immoveable property it will fail: *Enohin* v. *Wylie* (2).

It is submitted, however, that the Indian executors, if called upon to hand over this fund, might justly say, "We will act as the law of *India* calls upon us to act, and treat this as a void bequest": *Birtwhistle* v. *Vardill* (3).

Mr. *Everitt*, for a person in the same interest:—

The whole bequest fails; or, at least, it fails to the extent of the immoveable property: *Beaumont* v. *Oliviera* (4).

Mr. *Eddis*, Q.C., and Mr. *Bell*, for the Indian executors; also for the infant, *Kenneth Macdonald*:—

We support the same contention.

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the moveable property of an Englishman dying domiciled in *France*, and the succession to the immoveable property is regulated by the law of British *India*."

Part XII. "Of Void Bequests," in sect. 105, enacts as follows:—

"105. No man having a nephew or niece, or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

"Bequest to religious or charitable uses,"

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(1) 8 Cl. & F. 1.
(2) 10 H. L. C. 1.
(3) 7 Cl. & F. 895.
(4) Law Rep. 4 Ch. 309, 318.

8 Jun 1897

The effect of the 105th section is to introduce into *India* what is known in *England* as the law of mortmain.

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for the Scotch executors; also for two of the residuary legatees of the Indian property, who did not insist on the invalidity of the bequest:—

The contention that the whole gift fails is, in face of the authorities, hopeless. The cases cited lead to a directly opposite conclusion, as far as the moveable property is concerned.

It is shewn that either part of the fund is ample; then what necessity is there for considering the immoveable portion of it at all? Supposing we were in *Scotland*, and there was a fund of personalty exceeding £10,000, and a fund of realty exceeding the same sum, can it be doubted that the £10,000 would be paid out of the £10,000 personalty? Why should not the funds be marshalled? There is nothing to shew that the exceptional rule of English law, whereby Courts in this country refuse to marshal assets in favour of a charity, prevails in *Scotland*.

The VICE-CHANCELLOR asked Mr. *Cracknall* whether he admitted that the rule as to non-marshalling in favour of charities did not prevail in *Scotland*.

Mr. *Cracknall* said that, if necessary, he would ask that the hearing might stand over for inquiry on this point.

Mr. *Amphlett* said, that amongst the evidence was an affidavit by Mr. *Gordon*, a Scotch advocate, referring to an opinion upon a case which had been submitted to him; and although the case did not expressly raise the point, the fact that the rule in question did not prevail in *Scotland* was sufficiently manifest from the opinion (1).

(1) The following is an extract from the opinion:—

"According to the law of *Scotland* the bequest of £10,000 is a valid charitable bequest.

"The Indian estates, real and personal, if regard be had to the law of *Scotland*, are liable in payment of that bequest; assuming these estates to be effectually conveyed to and vested in his trustees."

"According to international law, the personal estate in *India* is liable in payment of the legacy of £10,000, which is valid, according to the law of Mr. *Macleod's* domicile."

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The VICE-CHANCELLOR assented to this view. There was no such opinion expressed, but there was a statement which excluded the possibility of there being in *Scotland* any rule against marshalling.

Mr. *Kekewich* observed that the illustration (*b*) to sect. 5 of the *Indian Act* completely governed the case.

Mr. *Cracknall*, in reply:—

The words "any property" in the *Indian Act* must refer to property of every description. We say this legacy was a charge on the blended fund, and must wholly fail: *Roberts* v. *Walker* (1).

SIR JAMES BACON, V.C.:—

This is a case of considerable novelty, but I do not feel much difficulty about it.

The testator, being a domiciled Scotchman, and having his rights of domicile applicable to every part of his personal estate, makes his will in the terms here mentioned. That his title of domicile applies is clearly established by the Act of the Indian Legislature, which says that "succession to the immoveable property in British *India* of a person deceased is regulated by the law of British *India*, wherever he may have had his domicile at the time of his death;" and that "succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death."

By the law of *Scotland* it is clearly established that the testator had a power of disposing of his property by way of legacies to charities, and that such legacies are payable out of all his estate. That right is only controlled by the Indian Statute, sect. 105 of which enacts that a man shall not bequeath any of his property by will to religious or charitable uses, unless certain formalities, which are mentioned in the Act, are complied with, if he has relations or persons in the degree of relationship therein described.

It is not contended that under the will of the testator in this case a charitable legacy can be paid out of any part of the testator's real estate; but it is said that, inasmuch as the testator has

(1) 1 Russ. & My. 752.

blended the whole of his real and personal estate into one fund, the charity legacy must abate in the proportion which the real fund bears to the personal fund. But in *Scotland*, the country the law of which is to regulate the disposition of the personal estate, the testator would be by law entitled to make a bequest both of real and personal estate. Now what has he done by his will? Perhaps it is not too much to say that the testator knew—at all events he must be taken to have known—the law of *India* in this respect, and that he could not dedicate his real estate in *India* to the payment of this legacy. What he does is to make one mixed fund; and he puts the whole of his property, real and personal, into the hands of trustees, and directs that £10,000 shall be remitted to this country. If the will had to be administered according to English law, it is plain that a proportionate part only of the legacy of £10,000 could be given. But that is not the law which is applicable to the case. The English law is a purely local law, founded, as has been accurately observed, upon the desire of the Court to give full effect to the mortmain statutes, and to prevent any evasion of those statutes, by any contrivance of a testator or his advisers. Therefore, although the rule of marshalling is a law otherwise universal as to legacies and charges and a variety of other things, in *England* it does not prevail in the case of charitable legacies, because it has been found that the rule of marshalling may be applied so as to evade the provisions of the *Mortmain Act*. If this artificial law which exists in *England* is not applicable to the case, there is nothing in the will, or any other part of the case, to prevent the whole £10,000 legacy being paid. Nothing is easier than for the trustees, if they think fit so to do, to make a separation of the funds in *India*. The result of the inquiry is, that there is abundance of money to pay this £10,000 legacy out of the pure personal estate alone. Unless, therefore, I go the whole length of Mr. *Cracknall's* argument, and say that, because there is no distinction between different classes of property in the 105th section of the Indian Statute, no man by Indian law can bequeath "any property" to religious or charitable uses, I cannot hold the whole of this gift to be void. Now, that I cannot go the whole length of that argument is clear under the statute; for before the 105th section comes the 5th section, which

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I have read, and which, as I feel bound to interpret it, leaves to a domiciled Scotchman all testamentary and other powers that he could have, or that anybody who succeeds him could have, over every part of his personal estate. Where is the difficulty in this Act, if I lay aside the artificial rule of not marshalling in favour of charitable legacies? The testator has said, "Put the whole estate into one fund, take out £10,000, and send it to *Scotland*, for the general purposes I have mentioned." If the whole estate had gone to *Scotland*, there is no doubt, upon the evidence as to the Scotch law, that the personal estate would have been applicable by the trustees in paying this charitable legacy. There is evidence as to the Scotch law which I take to be conclusive, because the facts are stated in the case submitted to the Scotch advocate. He gives an express and distinct opinion that the £10,000 is a valid bequest according to the law of *Scotland*. Nothing remains but to have it paid. Undoubtedly it cannot be paid if it is to be paid out of real estate in *India*. But if it is not to be paid out of the real estate, why should it not be paid out of the personal estate? In *England* it could not be paid in full because of the artificial rule I have spoken of. If there was no such rule as this in *England*, and this property was being administered in *England*, there can be no doubt that the charitable institution would be entitled to the benefit of the legacy.

Then what authority have I under this Indian Statute, which only restrains the disposition of Indian property—as I conceive, for public purposes, and on the ground of public policy—but which does not introduce the rule that you cannot marshal in favour of charitable legacies—what right have I to say that a man cannot dispose of the whole of his moveable property in any particular way he thinks consistent with the law of his domicile? There is quite enough to pay this £10,000, and I have no right to say that it is not to be paid? If the fund were insufficient to pay it, a great difficulty might arise. If it were impossible to pay the £10,000 out of the personal estate, then, probably, by reason of the Indian law which says that no part of the estate subject to that law can be resorted to, the legacy must of necessity, under the pressure of circumstances, abate. No such argument can apply here, because it is clear that there is abundant money to satisfy

this legacy. The personal estate is sufficient for the purpose. By law the testator was entitled to dispose of his personal estate, and he was subject to no such rule as exists in *England* as to marshalling.

My opinion therefore is, that the £10,000 must be paid according to the terms of the will.

The legacy will be payable to the Scotch executors, with interest from twelve months after the testator's death, at the rate of £4 per cent.

Solicitor for the Plaintiff: Mr. *Lattey.*

Solicitors for the Defendants: Messrs. *Clarke, Son, & Rawlins;* Messrs. *Williams & James;* Messrs. *Freshfield.*

V.-C. W.
1872
March 21.

WHITING *v.* BASSETT.

[1868 W. 106.]

Statutory Declaration in a Colony—Affidavit—Practice.

A statutory declaration not intituled in the cause was allowed to be filed with an affidavit intituled in the cause verifying the signatures of the declarants.

THE Plaintiffs, husband and wife, now residing in *New South Wales*, made in that colony, in November, 1871, in the most formal manner, and duly certified by a notary public, a statutory declaration, which was not intituled in the cause, that no settlement or agreement for a settlement whatever was made or entered into before or since the marriage was solemnized between them. The fund in Court was about £500.

Mr. *Everitt* asked *ex parte* to be allowed to file the document as an affidavit (1).

SIR JOHN WICKENS, V.C., on an affidavit being made verifying the signatures of the declarants, allowed the declaration to be filed therewith.

Solicitors: Messrs. *Herbert Lloyd & Lane.*

(1) See *Jearrad* v. *Tracey*, 11 W. R. 97.

BOWES *v.* FARRAR.

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April 16.

[1872 B. 22.]

Answer—Formal Words omitted.

An answer, in which the formal words, "In answer to the said bill, we say as follows," were omitted, was directed to be filed.

THE answer of the Defendants did not contain the words, "In answer to the said bill, we say as follows," as required by Cons. Ord. XV.: *Morgan's* Chancery Acts and Orders (1).

Mr. *Humphry* asked for a direction to the Clerk of Records and Writs to file the answer, notwithstanding such omission, and pointed out that in *Rabbeth* v. *Squire* (2) an answer was allowed to be filed notwithstanding the omission of the words, "to the bill of complaint of the above-named Plaintiff."

SIR JOHN WICKENS, V.C., directed the answer to be filed.

Solicitors: Messrs. *Torr, Janeway, & Co.*, agents for Mr. *W. Lancaster, Bradford, Yorkshire.*

(1) 3rd Ed. p. 432, 598.

(2) 10 Hare, App. iii.

M. R.

1872

March 18; *April* 16.

In re ENGLISH ASSURANCE COMPANY.

HOLDICH'S CASE.

Life Assurance Company—Winding-up—Value of Current Policy—Estimate of Amount of Claim—Companies Act, 1862, *s.* 158.

In estimating the value of a current policy in a life assurance company in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the same premium in a solvent office.

Bell's Case (1) followed. *Lancaster's Case* (*Albert Arbitration*) disapproved.

THIS was an application by way of adjourned summons under sect. 158 of the *Companies Act*, 1862, and the question in the case, which was a representative one, was as to the proper mode of valuation of current policies or the proper amount for which holders of life policies were entitled to prove in the liquidation of a life assurance office, having regard to the *Companies Act*, 1862, s. 158, and Rule 25 of the General Order under the Act.

Mr. *Southgate*, Q.C., and Mr. *Field*, in support of the summons, relied on *Bell's Case* (1).

Sir *R. Baggallay*, Q.C., and Mr. *Haddan*, for the official liquidator, referred to the decision of Lord *Cairns* in his Arbitration on the *Albert Life Assurance Company* in *Lancaster's Case* (2).

17 L.T.D. 339

(1) Law Rep. 9 Eq. 706.

(2) Lord *Cairns'* judgment (Minutes of Proceedings in *Albert Arbitration*, p. 677) was as follows:—

I have now to dispose of the case which was brought before me for the purpose of determining the amount of proof upon policies and annuities, *Lancaster's Case*.

This is a question of considerable difficulty. I should have been very glad if I had found that any principle had been adopted by the Court of Chancery in the course of the winding-up which would have been applicable, upon satisfactory grounds, both to policies and to annuities, and which, therefore, I could have followed without any further examination. I have been unable, however, to satisfy myself that any principle has been adopted by the Court of Chancery, which will apply upon sound and clear grounds to the case of policies of insurance and of annuities, and which would in my opinion be consistent with the enactments of the Act of 1862.

In considering the question, I have to deal with the case, and only with the case, of those life policies and

April 16. Lord Romilly, M.R.:— M. R.

1872

Holdich's Case.

This is a summons adjourned from Chambers, and is one of great importance, not merely from its being a representative case

annuities which were actually current at the date of the winding-up. Where instalments of an annuity had actually become payable, or where a life policy had actually become payable before the date of the winding-up, there no question as to valuation arises. The claim would be admitted for the actual sum that ought to have been paid before the winding-up. I have to deal with those cases where the policy or the annuity contract was current at the date of the winding-up. There are in some or all of the companies other contracts of a more special kind —for instance, endowments, and contracts of survivorship—but the general observations will apply, with an alteration of detail only, to those other cases.

[After considering the case of an annuity contract His Lordship proceeded as follows:—]

I now come to the case of policies of insurance. I take at present whole-life policies. I may repeat shortly what I have often had occasion to say here. What is the nature of the contract of insurance? It is a contract by which the insured is under no obligation to pay the premiums, it is a contract by which the company insuring is under no obligation to continue its business, but the company undertakes that if the person insured will pay the fixed premiums from year to year, the funds of the company for the time being, including the unpaid capital, shall be answerable in proper order to pay the sum insured on the falling in of the life, and on proper proof of that event being given to the company.

That being the nature of the contract, it is to be observed in the first place, that at the date of the winding-up, taking it distinctly as at that moment of time, there is no breach of the contract (I have said that where the life has dropped before the winding-up a policy of that kind stands in a different position; it is an actual claim for the whole amount.) It is also to be observed that we have here to deal, not with the case of a going company which is being sued for a breach of contract. Indeed, it is very difficult to see, in a case of a policy of insurance, how there can be any breach of contract short of a refusal to pay upon the falling in of the life. I know it has been suggested that a refusal to receive the premiums from year to year would be a breach of the contract, and that thereupon an action might be brought. I do not desire to express any opinion upon that point, but it is somewhat difficult to see how such an action could be maintained, and certainly, as far as I know, no such action has ever been brought or maintained. But all that may be set aside here, because, whether an action could or could not be maintained for a refusal to receive the premium, I repeat that at the date of the winding-up, even in that sense, there was no refusal to receive the premium, and therefore no breach of contract. If, however, a going company were sued for a real breach of the contract, that is to say, for the non-payment of the sum insured, there, again, it is difficult to imagine how there could be any damages other than the amount which was covered by the policy, which ought

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which must affect a great number of other cases, but one which will constantly recur whenever an assurance company has to be

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to have been paid. In the case with which I have to deal it is only, as it seems to me, under the operation of the 158th section and the 25th rule that policies current at the date of the winding-up can be provided for, and claims in respect of them entertained under the winding-up at all. I should have thought that, but for an authority in the Court of Chancery, which I shall presently refer to in detail, namely, *Bell's Case* (Law Rep. 9 Eq. 706), the course pointed out by this section and this rule was clear. It is well known what putting an estimate on the value of an insurance means. Persons may differ as to the table by which the valuation is to be made, or as to the rate of interest to be taken, but the way in which the value of an insurance is to be estimated is a thing perfectly well known, and the thing is attempted and succeeded in every day, and I should have thought, but for the decision to which I have referred, the course under the 158th section and the 25th rule was a clear one, and as simple as any somewhat difficult problem of arithmetic could be made.

The effect of the decision in *Bell's Case*, however, as I understand it, is this. The Court there held that this mode might be adopted of valuing a policy. You might select another company with premiums the same as the *Albert*, with capital and guarantee proprietary fund as nearly as possible the same as the *Albert* had, or, at all events, professed to have. You might then go to that company and find for what premium the company would now insure the life of a person insured in the *Albert*, after examining, if necessary, his state of health, and then, when you had found the premium which the person insured would have to pay to this new company at the present time, and had compared that with the premium he before paid for the same amount to the *Albert*, and had taken the difference between the two premiums, and had capitalized that difference, having regard to the expectancy of life, you would then have the amount which ought to be paid to the person insured to put him in as good a position as he would have been in if the *Albert Company* had not been wound up. Now, so far as that sum arises from the mere difference of age, introducing no other ingredient into the case, but taking, for instance, a person who was insured in the *Albert* at the age of twenty-five, and who is to be reinsured in this supposed company at the age of fifty, not looking at any difference in the state of health at one time and another, but merely looking at the difference of premium for a man of twenty-five and a man of fifty—so far as the decision was founded on those elements, the decision would have supplied a not inaccurate mode of arriving at an estimate of the value of the policy. If there was nothing more, then I should have been willing to have followed that principle. But the difficulty I feel is in following the decision so far as it introduces into the case other elements, namely, the re-examination and the consequences of the re-examination or the non-examination of the lives to be insured by the new company. Because the decision goes to this, that if the particular person whose life is proposed for re-insurance has in the meantime passed into a state of health which either makes him non-

wound up in a Court of Equity. It is also a case which has given rise to great contrariety of opinion amongst actuaries and all per-

insurable or makes him insurable only upon more disadvantageous terms than formerly, or if the life to be re-insured cannot be produced for re-examination, in all those cases the person is under some peculiar and special damage arising in his own case—a special and peculiar damage separate from the question of the value of his policy, and practically provision is to be made out of the assets of the company for that particular and special damage.

Now I have considered *Bell's Case* (Law Rep. 9 Eq. 706) with great anxiety, as the decision of a Judge for whose opinion I have the highest possible respect, and who appears in that particular case to have taken very great pains to give weight to all the arguments which were addressed to him in support of the different views that were then proposed to the Court. I will state shortly the reasons which make me unable to follow the part of the decision which I have last adverted to.

In the first place I find, judging from the report, that neither in the arguments before the Court, nor in the judgment of the learned Judge, was any reference whatever made to the section of the Act which I have mentioned or to the 25th rule. In point of fact, the date of the winding-up order mentioned in the 25th rule was not taken at all as the date for valuation, but a period altogether different, namely, a period at the close of the time covered by the last premium that was paid. I cannot help thinking that, if the section and the rule had been prominently brought before the Court, the Court would scarcely have arrived at the conclusion it did in *Bell's Case*.

In the next place, in my opinion, the problem to be solved under the Act being the finding of a just estimate of the value of the policy, the special damage sustained by a particular individual has nothing whatever to do with the value of the policy. In the course of the argument I put a case that will illustrate sufficiently my meaning. Take the case of *A.* effecting an insurance on the life of *B.* *B.* is abroad. The object is that *A.* should be re-insured in a new company. The new company will say: "You must produce the life, so that we may examine him." He being abroad will not come at all; or, being at a great distance from England, says: "I will come home to be re-examined if you pay my expenses home and back again, which will cost £200." The question that occurs to my mind is, what possible equity can there be in the distribution of assets to make the other policy-holders pay this £200 (because it must be paid out of their money) in order to indemnify the particular policy-holder *A.* for the expense of bringing to this country the life that is to be inspected for re-insurance? In point of fact, special damage seems to me to be a thing relating entirely to a class of ideas different from the class of ideas entering into the question of the valuation of a policy for the purpose of paying its value out of assets. Special damage would apply to the case I supposed some time ago of an action brought against a going company for a breach of contract, in which case a jury may be directed to take into account the special damage done to the particular individual.

The next point in regard to *Bell's*

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sons connected with assurance companies. It has been decided in one way by the present Lord Justice *James*, when Vice-Chan-

Case (Law Rep. 9 Eq. 706) which I have to observe upon is this: the mode of valuation there adopted involves the question of what another company would think of the health of the person formerly insured in the company being wound up. Now, in the first place, that raises the inquiry not merely of what the state of health of the person is, but retrospectively what the state of health of the person now to be examined was at a period nearly two years past and gone, as to which the state of health of any person must be merely a matter of speculation and conjecture. Further than that, it introduces not merely opinion evidence as to the state of health, which is never satisfactory, but opinion evidence of the worst possible kind, because it is to be the opinion evidence of another company, or the officers of another company, who are not going actually, or may not be going, to insure the life; for there is to be no obligation after all upon the other company to insure the life, and no obligation upon the person making the claim to insure himself in the other company. It is opinion evidence, again, which you have no means of checking, because the enquiry proposed by the Court is, what would another company do if it were asked to insure the life? The only answer to that can be from the other company, that they would either insure the life or not, or would insure it for such an additional sum, and from the very nature of the case that is evidence which cannot be controverted, because it is not evidence of a fact, but evidence merely of a speculative opinion.

Further, the test proposed in *Bell's Case* substitutes a solvent for an insolvent company, and under the guise of attempting to put the person insured in as good a position as he was in before, the mode adopted would put him in a very much better position.

Then this alone would be to my mind an insuperable difficulty in adopting the principle of *Bell's Case*,—the principle of that case is not homogeneous with the mode of valuing annuities adopted by the Court of Chancery in this winding-up. Annuities are proposed to be valued precisely on the principle of taking the value of the annuity as a piece of property, and not on any question of special damage sustained by the annuitant. Therefore, in dealing with assets of which there must be a distribution between annuitants and policy-holders, and which ought to be distributed on homogeneous principles as between the two classes of claimants, the Court would be dealing with one class of claimants in one way and with the other in a perfectly different way, and instead of dividing the assets equitably would be dividing them inequitably.

I am, therefore, unable to follow the mode of valuation suggested in *Bell's Case*, and, after the best consideration which I am able to give to the subject, and after fortifying myself with the best advice which I could procure from the best authorities, I have come to the conclusion that there must be what is termed and well known as a pure premium valuation as at the date of the winding-up order, the rate of interest assumed being four per cent., and the tables being the Seventeen Offices Experience Tables. The principle will be adopted in this way. There must be determined on the one hand the present value of the reversion in the sum

cellor, in *Bell's Case* (1), and that decision has been carefully examined and elaborately commented upon by Lord *Cairns*, who has come to an opposite conclusion in *Lancaster's Case*, while acting as parliamentary arbitrator in the *Albert Assurance Company*.

The question, therefore, is one not only of considerable difficulty, but one which will probably have ultimately to be determined by the highest Court of judicature in this country.

The question may be stated in the shortest possible terms. It is this: For what amount is the holder of a life policy in the company under liquidation entitled to prove against the assets of the company?

The Lord Justice *James*, when Vice-Chancellor, decided that this was the rule to be followed: Select another company of perfectly solvent reputation, with premiums the same as those of the company in course of liquidation: find for what premiums that company would now insure the life of the person assured in the company in course of liquidation: the person whose life is assured is to be at liberty to shew that his then state of health is such that the new company would require a higher premium than that which would have been required merely from the lapse of years, and then, having ascertained the increased premium which the person seeking to prove would have to pay to the new company at the present time, take the difference between the two premiums and capitalize that difference, having regard to the expectancy of the life of the person in question; and that will give you the amount which ought to be paid to him to put him into as good a position

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assured at the decease of the life, and on the other the present value of the future annual premiums. The difference between these two sums represents the value of the policy. But the annual premium payable is divisible into two parts,—first, the part which it is calculated will provide for the risk, called the pure premium, and secondly, the addition for office expenses and other charges, which is sometimes called *the loading*. The pure premium only is to be taken into account. The value of the policy, therefore, will be the difference between the value of the reversion in the sum assured and the value of a life annuity of an amount equal to the pure premium.

The observations I have made have put out of the case altogether the question of any peculiar mode of valuation of profit policies. That I consider to have been properly dealt with by the Court of Chancery. The portion of the premium attributable to the sharing of the profits is altogether out of the case.

(1) Law Rep. 9 Eq. 706.

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as he would have been in if the company in course of liquidation had not been wound up.

Lord *Cairns* states his apprehension of the rule as laid down by the Lord Justice *James* very much to the same effect.

Lord *Cairns*, after examining that judgment, comes to the following conclusion: "There must be what is termed and well-known as a pure premium valuation, as at the date of the winding-up order, the rate of interest assumed being £4 per cent., the tables being the Seventeen Offices Experience Tables. The principle will be adopted in this way: There must be determined on the one hand the present value of the reversion in the sum assured at the decease of the life, and on the other the present value of the future annual premiums. The difference between the two sums represents the value of the policy. But the annual premium payable is divisible into two parts: first, the part which it is calculated will provide for the risk, called "the pure premium"; and secondly, the addition for office expenses and other charges, which is sometimes called "the loading." The pure premium only is to be taken into account. The value of the policy therefore will be the difference between the value of the reversion in the sum assured and the value of a life annuity of an amount equal to the pure premium."

Lord *Cairns* proceeds entirely upon the 158th section of the *Companies Act*, 1862, and the 25th rule of the General Order of November 11, 1862, issued under the authority of that statute. The section is in these words: "In the event of any company being wound up under this Act all debts payable on a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made as far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

The 25th rule of the General Order is in these words: "The value of such debts and claims as are admissible to proof by the 158th section of the said Act shall so far as is possible be estimated according to the value thereof at the date of the order to wind up the company."

The real question is this: what is a fair sum to force a man to

take at the date of the winding-up in lieu of a fixed sum contracted to be paid at the time of his death?

It appears to me the first thing to be ascertained in considering this question is, what is the contract which has been entered into between the assured and the company; remembering always that this is not the case of a mutual assurance company, where the policy-holders are partners, but strangers, who are contracting with each other. The contract I take to be this: *A.* insures his life with the company for payment of a given sum at *A.'s* death, without profits, in consideration of *A.* paying an annual premium to the office of a given amount. *A.* on one side, to entitle himself to the sum assured, has to pay, as long as he lives, the annual premium to the company; the company, on the other hand, contracts that when *A.* dies they will pay the amount assured, and that no accident or disease which may curtail the chance of living of *A.* shall entitle the office to increase the premium.

The conclusion at which Lord *Cairns* has arrived appears to me to overlook this point in the real contract which is made between a person who insures his life and the assurance company. If there were no such things as diseases or accidents, but all men lived to an age when the body decayed by age, more or less rapidly, according to the strength and nature of the constitution, a pure premium valuation would appear to be an easy mode of solving the difficulty; but it is obvious and indeed notorious that most if not all persons who insure their lives do so expressly to guard against the contingency that an unexpected disease or an unforeseen accident may shorten their life, and prevent it from running what, without the occurrence of such contingency, would be the probable term of its duration. It is obvious also that such diseases and such accidents are taken into account by the assurance office upon an average of the lives assured, and form an item in the scale of mortality on which the company calculates the amount of the premium to be paid. You deprive the assured of the benefit of his contract if you do not give him compensation for an accident which has made his life uninsurable, and consequently his policy more valuable, at the time when the company is wound up.

Suppose such a case as this, and see how it would work under Lord *Cairns'* plan: Two persons of the same age insure their

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lives, each for the same sum in the same office at the same premium. The company is wound up. One dies a month before liquidation begins; the other, whose health has become seriously impaired, dies shortly after the liquidation has begun. One is entitled, according to every rule, to prove for the whole amount of the sum insured; the other must submit to a reduction which, according to Lord *Cairns*' plan, will deprive him of the greater part of the sum assured, while according to Lord Justice *James*, he is entitled to such a sum as would be sufficient to induce a new office to give the assured a policy for the same amount at the former premium.

Lord *Cairns* seems to be of opinion that the 158th section and the 25th rule make it imperative that the proof shall, when made, be for a sum to be ascertained at the date of the order to wind up the company. But the rule itself notices that in many cases this must be impossible, and accordingly inserts the words "so far as is possible." Now, I am of opinion that this is one of the cases where such ascertainment of the value of the proof is not possible. No doubt the day of the winding-up order is the time at which the value of the policy or annuity is to be calculated; but subsequent facts may be given in evidence for the purpose of shewing what the real value was at that time, such as the sudden death of the annuitant or of the assured, in the one case a benefit to the company, in the other to the estate of the assured. If in every case the day of the death of the assured could be ascertained, the problem would be a very easy one, and ought to be calculated on the principle of the value of the reversion less the value of the annuity, both calculated to the day of the death of the assured. This is, from the nature of things, impossible, but an approximation to it is attained, not merely from the age of the assured, but also from his state of health. If the state of health of the assured be varied, and such variation has been provided for and forms a part of the contract, then the principle adopted by Lord *Cairns* appears to me to be no longer applicable. If, as I believe, it be clear to demonstration, that the chance of the premature termination of the life of the assured from causes other than gradual efflux of age forms one of the principal motives for assurance, and one of the contingencies the possible occurrence of which is contracted for,

why should not this form part of the proof, if, by the occurrence of it, the assured has sustained special damage? Any other matter that forms part of the contract must follow the usual course in such cases. For instance, if it formed part of the contract that the policies should be valued according to any particular principle or by any specified table of mortality, then this would supersede all other questions. If a particular rate of interest were specified in calculating the value, this would be followed; if no scale of interest were specified the Chancery scale of 4*l.* per cent. might then be adopted.

Consider the case of a contract made for sharing in the profits to be made by the office. This being the case of a company under liquidation, no profits have been made, and therefore the assured gets none; but all persons agree that the assured cannot, for that reason, require the extra amount of premium he has paid in the hope of profits to be repaid to him, because he has contracted for a matter necessarily uncertain, the occurrence of which was doubtful, and which has not occurred. Why, in all these cases, should the contract be followed, and not in the present case, where, if I am right, the contract expressly undertakes to provide for the special damages which fever or accident may bring upon the assured, and not to require any addition to the premium if any such event should occur which abridges the chances of life? Suppose an office to contract with the assured that if he should be attacked with a pulmonary complaint he will pay an additional premium. He would be compelled to perform his part of the contract. Why is not the company to perform their part of the contract if his insurance, by reason of the same circumstances, has become of double its former value?

The second objection urged by Lord *Cairns* to the principle of the decision in *Bell's Case* (1) does not appear to me to be well founded. That case, as it appears to me, very properly lays down that, unless the contrary is shewn, all lives will be assumed to be in a normal state, and that no change has taken place other than that which arises from the advance of age; but it appears to me that, from accident or illness, a higher rate of insurance is required, that being a circumstance of special damage contracted

(1) Law Rep. 9 Eq. 706.

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against, it may be taken into consideration in ascertaining the amount of the proof, and the burthen of proving it lies on the person who seeks to prove. The suggestion of the instance given by Lord *Cairns*, where it requires £200 to produce the life insured, would apply in like manner to every case where the proof of a debt involves considerable expense, and the question of who is to bear the cost of re-examination is a separate matter.

In the case supposed you must give evidence to satisfy the Court, which evidence is to be laid before another office, not for the purpose of asking that office to insure the life unless the person applying desired to effect such insurance, but for the purpose of asking that office what, in that case, would be the additional premium they would require to insure the life in question. The amount of the evidence given of the accident or illness, or the state of health of the proposed life, would in every case be subject to the control of the Court, and might be objected to by the official liquidator on behalf of the company, as in the case of the proof of any other debt, and only what was proper allowed. Assume that the proof ought to be given of the state of the life at the date of the order to wind up, the subsequent state of health of the assured up to the time of taking in the claim would properly be given in evidence as affording evidence of the value of the life at that time. Neither do I understand the force of the last objection urged by Lord *Cairns*—that it introduces not only opinion evidence as to the state of health, but opinion evidence of the worst possible kind, because it is the opinion evidence of another company, who are not going to insure the life. Now it is true that opinion evidence is always uncertain, but it is, in the nature of things, evidence on which, in a vast variety of cases, a Court of Equity is compelled to act. The great objection to it usually is that it never can be tested by any indictment for perjury, and is too often given with a bias in favour of one side even by perfectly honourable and fair men, and often without their being conscious of the bias; but if there be one species of evidence of opinion more trustworthy than another, it is, as it appears to me, the opinion of an assurance office on the life of an applicant, not only because they can have no bias either for or against the claimant, and because their opinion may immediately be tested by

the application for a fresh life policy by that claimant, or by the application for an annuity for life, either of which tests the office, it is obvious, cannot refuse to submit to, if they should be required so to do, as long as they carry on business.

The case in reality seems to resolve itself into this: the office has contracted to give the assured the pecuniary advantages which may arise to him from accident or disease; is the office, because it has been compelled to undergo a course of liquidation, to escape from the compliance with this part of their contract? And if so, for what reason? Can it be because it is difficult to ascertain? or because it is liable to error?—all of which they knew and undertook when they accepted the life. If so, a new principle would be introduced in ascertaining the damages sustained by one party to a contract from the breach of it by the other—a principle, I venture to say, of great danger, and extremely difficult of application, if the Court is to determine what species of damage is to admit of no compensation.

Two healthy young men of the same age insure in the same office for the same premium; they meet with the same accident in a railway carriage; one is killed on the spot a few days before the order for winding up. His estate proves in full against the office; the other survives a fortnight, and according to Lord *Cairns'* principle his estate proves for little or nothing. Surely the deterioration of his life, which by the express contract of the company was not to retard or diminish their liability to pay the full sum assured whenever he might die, ought to be taken into account. Observe also the case of annuities; the same rule must apply both to policies and annuities. The deterioration of the health of the annuitant is a benefit to the company. Suppose a young annuitant die suddenly after the winding-up, but before any fresh payment of an annuity on his life has occurred; is the company to pay to his representatives a sum calculated on the hypothesis that he may live twenty-five years? If it be said that in such a case the company has performed their part of the contract, and are not further liable, does not a like principle apply if at the date of the winding-up order he had a mortal complaint but might linger for a year? In either case I think the rule must be, What would buy a similar policy or a similar annuity from a

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perfectly safe office? In one case the burthen of proof, the deterioration of the life, falls on the assured or his representatives; in the case of the annuitant it falls on the company; but in either case the investigation may be waived by the party interested. I am also unable to understand how, according to Lord *Cairns'* plan, the pure premiums, and that portion which he calls "loading," are to be ascertained. I do not believe that there is the same system in all offices, even in those of the best regulated description. Who is to be judge what it was in the office under liquidation? and how is it to be determined? Part of it is composed of the profit premiums of the persons who contracted for a share of profits. Is this to be deducted?

It appears to me to be the introduction of a merely arbitrary rule assigning to an office a calculation which may or may not have made the basis of their tables, but which assuredly was not the contract entered into by the parties to it, but which is a new contract which the Court of Chancery, for its own convenience, thinks fit to substitute for the real contract. I am also unable to understand the principle which makes such a distinction between the case of non-profit policies and that of profit policies, and between them and annuities.

In the case of profit policies the whole of the premiums must be calculated without any deduction; in the case of annuities the whole value of the annuity for the probable duration of life is to be calculated without any deduction. Why is the premium in the case of a non-profit policy to be treated differently, and an attempt made to separate in an arbitrary manner, by a sort of rule of thumb principle, what is loading and what is not?—a method which, in nine cases out of ten, was not adopted by the company in question in calculating the tables which formed the basis of the contract. The assured has contracted to pay a certain premium without reference to any question of loading or not loading; that is his contract; why is he not to pay it, or the value of the policy, to be calculated as if he had only to pay a portion of it? The whole plan suggested by Lord *Cairns'* decision appears also to me to involve a false principle, which makes the circumstance of insolvency alter the proportionate part of the assets of a company to which a class of the creditors is to be entitled, so that, while before

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the liquidation they were entitled to one proportionate part, after the liquidation they would be entitled to another proportionate part of the assets.

I have given the subject the best consideration I have been able, and in my opinion the proper rule to be followed is that which was laid down by Lord Justice *James* in *Bell's Case* (1). I shall follow it on the present occasion, and direct the costs of all parties to be paid out of the estate.

Solicitors for the policy-holder: Messrs. *Field, Roscoe, & Co.*
Solicitors for the liquidator: Messrs. *Young, Maples, & Co.*

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[1871 P. 100.]

Specific Performance—Mistake—Agreement for Lease for Seven or Fourteen Years—Option of Lessee—Authority of Agent.

The Court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.

Accordingly, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:—

Held, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years:

Held, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority.

THIS was a suit for the specific performance of an agreement for a lease.

In September, 1870, the Plaintiff, *William Powell*, entered into negotiations with *T. H. England*, who acted as agent for the Defendant, *Ernald Mosley Smith*, with the view of taking a lease of a farm belonging to the Defendant, and lately in the occupation of

(1) Law Rep. 9 Eq. 706.

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L. Whitwell, and an agreement was entered into between them which, so far as material, was as follows:—

"Terms agreed upon this 1st day of October, 1870.

"Lease to be for 7, 14, or —— years from the 29th of September, 1870.

"Rent £145 per annum for the farm, as late in Mr. *Whitwell's* occupation.

"The valuation to be made by Mr. *Rutley* of the tenant right and other matters under the clauses of Mr. *Whitwell's* agreement, and the amount thereof paid by Mr. *Powell* on his taking possession of the farm, or as may be arranged.

"The house and buildings to be put into tenantable repair by Mr. *Smith*, and to be kept and left so by Mr. *Powell*.

"Signed, *T. H. England.*
"*Wm. Powell.*"

The Plaintiff alleged that in part performance of the said agreement the Defendant let him into possession of the said farm as tenant thereof under the said agreement, and that on the faith of the said agreement, and in part performance thereof, the Plaintiff paid £616, being the balance of the valuation made by *Rutley*, and that the Plaintiff had ever since been in occupation of the farm as tenant thereof, on the footing of the said agreement, and had laid out large sums in the improvement of the farm.

The Defendant, however, refused to grant him a lease for more than seven years without inserting a power for the landlord to determine the same at the end of seven years.

The Plaintiff accordingly filed his bill on the 8th of June, 1871, praying that the Defendant might be decreed specifically to perform the said agreement of the 1st of October, 1870, and to grant a lease to the Plaintiff of the said farm for fourteen years, on the terms mentioned or referred to in the said agreement.

The Defendant admitted that the agreement was executed in the terms above mentioned, but stated that when *England* signed it he was only authorized to make, on his behalf, an agreement with the Plaintiff to grant him a lease of the farm for a period determinable at the option of either party at the end of seven or fourteen years, and that he had no authority to agree to grant a lease deter-

minable at the option of the Plaintiff only; he insisted that such was the true construction of the agreement, but that if it purported to grant such a lease as the Plaintiff claimed it was made without his authority, and was one which he had never ratified, and which did not express the real intention of the parties signing it.

It appeared from the evidence that the Defendant had an estate of about 3000 acres, and that all his leases to other tenants were determinable at the end of seven years, at the option of either party. The Plaintiff, however, deposed that he was not aware at the time of the agreement of any such provision being inserted in the other leases granted by the Defendant, and that he signed the agreement with the full understanding and belief that the lease would only be determinable by himself.

The bill prayed that the Defendant might be decreed specifically to perform the agreement of the 1st of October, 1870, and to grant a lease to the Plaintiff of the said farm for a term of fourteen years, according to the terms and conditions of the agreement.

Mr. *Southgate*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

By the terms of the agreement of the 1st of October, 1870, the Plaintiff was entitled to a lease for fourteen years, determinable at the end of seven years at the option of the lessee. It is clearly settled that the legal effect of a contract for a lease for seven, fourteen, or twenty-one years is that it is determinable at the shorter period by the lessee only: *Dann* v. *Spurrier* (1); *Doe* v. *Dixon* (2). In *Price* v. *Dyer* (3), which was a suit for specific performance of an agreement for a lease for seven, fourteen, or twenty-one years, a similar defence was set up to that raised in the present case; and it was sought to resist specific performance on the ground that the contract was varied by a subsequent parol agreement that the lease should be determinable at the option of either party. It was there assumed that the option rested with the lessee only, and the Court held that the legal effect of the written instrument must stand notwithstanding the variations verbally agreed upon.

In *Swaisland* v. *Dearsley* (4), where a Plaintiff sought to set aside a contract on the ground of mistake, and it appeared that the

(1) 3 B. & P. 399.
(2) 9 East, 14.
(3) 17 Ves. 356.
(4) 29 Beav. 430.

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description of the property was ambiguous, it was held not to be enough for the Plaintiff to swear that there had been a mistake where no ground for such mistake appeared on the particulars of sale. In the present case there was not a mistake of fact, but of law, which is no defence to a suit for specific performance.

The question then arises, whether the Defendant can set aside the contract because, as he alleges, he never authorized his agent, Mr. *England*, to make it for a lease which the lessee could determine. We submit that the evidence fails to shew that the agent acted without authority; but even if he did, his contract has been ratified by the Defendant's subsequent conduct. Where a contract has been signed on behalf of another, who does not at the time assent to it, but who, after he knows what the contract is, does not within reasonable time disavow it, his assent will be presumed: *Bigg* v. *Strong* (1). So where a principal acts on the contract entered into by his agent beyond the scope of his authority, he cannot afterwards dispute his agent's authority to enter into it: *Stuart* v. *London and North Western Railway Company* (2). Here there was a clear ratification, as the Defendant allowed the Plaintiff to take possession of the farm under the agreement, and to pay the outgoing tenant for the stock.

On these grounds we submit that the defence raised by the Defendant wholly fails, and that the Plaintiff is entitled to a decree.

Sir *R. Baggallay*, Q.C., and Mr. *Phear*, for the Defendant:—

We do not dispute the authority of *Dann* v. *Spurrier* (3) and the other cases relied on by the Plaintiff; for where an agreement for a lease for seven, fourteen, and twenty-one years *simpliciter* is entered into, the presumption is that it is to be determined at the option of the lessee. But the Court will look at all the surrounding circumstances. In the present case the Defendant is owner of a considerable estate, and it appears by the evidence that in all his leases a clause is inserted making them determinable at the lessor's option only. This may be relied on as confirming the Defendant's evidence that this agreement was made under a misapprehension.

(1) 3 Sm. & Giff. 592; 4 Jur. (N.S.) 983.
(2) 15 Beav. 513, 520.
(3) 3 B & P. 399.

The way in which the Court will deal with contracts where one of the contracting parties proves that he has entered into it in a different sense from the other was considered in *Wycombe Railway Company* v. *Donnington Hospital* (1), where, speaking of the way in which a vendor had understood the contract, Lord Justice *Knight Bruce* observed: "It is sworn by the vendor's agent that this was his sense and understanding. It would be contrary to the rules of this Court to enforce specific performance against a Defendant so swearing, and in fact so proving."

Further, the Defendant's agent, Mr. *England*, was never authorized to enter into an agreement for such a lease as that to which the Plaintiff now claims to be entitled. In *Manser* v. *Back* (2), which was a suit by a purchaser to enforce specific performance of a contract entered into by an auctioneer by mistake for the sale of property, as to part of which his authority had been revoked, it was held that it was competent to the vendor to insist upon such revocation, and that parol evidence was admissible in support of that defence.

Swaisland v. *Dearsley* (3) was cited on the other side; but we contend that it is an authority in our favour, for it was there held that the contract could not be enforced. In *Webster* v. *Cecil* (4), where the vendor had by mistake inserted a wrong sum for the purchase-money, that was held to be sufficient to prevent a contract from being enforced.

In *Harris* v. *Pepperell* (5) your Lordship observed: "Where a deed is not actually executed the Court will not enforce specific performance of a contract which one party has entered into under a mistake." The mistake in this case being proved, and the agent having acted without authority in making the agreement in these terms, we submit that it cannot be enforced.

LORD ROMILLY, M.R.:—

I am of opinion that this is not properly a case of mistake at all. In those cases in which agreements have been set aside on the ground of mistake, there has been a mistake as to the agreement

(1) Law Rep. 1 Ch. 268, 273.
(2) 6 Hare, 443.
(3) 29 Beav. 430.
(4) 30 Ibid. 62.
(5) Law Rep. 5 Eq. 1, 4.

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which has been entered into. That is not the case here, for the words of the agreement are not disputed on either side; nay, more, shortly after the agreement was entered into, it was so far ratified that under it the Plaintiff was actually put into possession of the farm. All those cases which have been cited during the argument are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. In all those cases the Court has held that it must look at the evidence, and that if the mistake is sufficiently proved the Court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned.

The construction of the agreement is unquestionable. When it says, "for seven or fourteen years," those words allow the lessee to have an option of saying whether he will give it up at the end of the seven years. Upon that there is no question whatever. Therefore it is not, as was stated here, a mistake as to the contract which was entered into, but that a person entered into an agreement, the legal effect of which he did not know at the time. But the legal effect of a contract upon the true construction of the words, is a matter by which he is bound. Here the Defendant has acted upon this agreement. He was aware that the Plaintiff took possession of the farm a few days afterwards, and paid the outgoing tenant for the stock on the farm.

If it could be proved that the Plaintiff knew that the Defendant never granted leases in which he did not reserve the option of determining the leases to himself as well as to his lessees, according to the form adopted by some large landed proprietors, then another ingredient might arise, namely, that of fraud in taking advantage of that which, though it was understood by him, was not stated. But the Plaintiff says in effect, "Here is the agreement, and all I come to you for is to execute a lease in conformity with the agreement;" and then the Defendant says, "I did not mean the agreement to have its legal effect." Could he have alleged

that the agreement was not binding on him, so that he was not bound to execute a lease in conformity with it? It is clear from the authorities cited by Mr. *Phear* that where the Court sees there can be no mistake, it will not, on such a ground as here alleged, set aside the contract or interfere to prevent its specific performance.

Besides, in the cases referred to one important ingredient in considering whether the Court will set aside a contract has been this—Can the parties be put in the same position in which they were before? In the present case that cannot be done, for the Plaintiff cannot be put in the same situation now as if the agreement had been carried into effect for a lease of the farm two years ago. In all these cases time is of the essence of the contract. Moreover, this is not a case in which the Plaintiff should be left to his remedy at law, for it is the object of suits in this Court to make the decision final, and it would be difficult to ascertain the extent of the particular damage which the Plaintiff has sustained, or what he might have obtained elsewhere if he had not entered into this contract.

Here the Defendant by his agent has adopted a certain form of agreement, and then when he finds out that it gives certain rights which he did not intend, he wishes to put an end to it. But this Court considers that every one entering into such a contract is bound to know what the law is, and as the Defendant entered into it with his eyes open (assuming that he is bound by the acts of his agent) he cannot set it aside because he finds the construction of it is against him.

I am quite clear also that the Defendant has assented to Mr. *England's* contract, and that his acts have put the Plaintiff into possession. The result is that the Plaintiff is entitled to a decree, and to have a lease for seven or fourteen years, determinable at his option at the end of seven years.

Solicitors for the Plaintiff: Messrs. *May & Sykes.*

Solicitors for the Defendant: Messrs. *Taylor & Baxter,* agents for Mr. *W. H. Rowland, Croydon.*

M. R.
1872
May 27, 28.

WIGG *v.* NICHOLL.

[1869 W. 231.]

Charitable Legacy—Pure and Impure Personalty—Direction to marshall—Statute of Mortmain (9 *Geo.* 2, *c.* 36).

16 Eq 469
9 Ch 318, 323

A testator directed all the rest, residue, and remainder of his personal estate which might be legally applied for such purposes to be paid unto and equally between six hospitals therein named (two of which had power by law to take and hold land notwithstanding 9 Geo. 2, c. 36, while the other four had not); and he directed that his estate should be so marshalled and administered as to give the fullest possible effect to the bequests in favour of charitable institutions thereinbefore contained; and he gave his residuary real estate and all the residue of his personal estate which should not be applicable to and applied in the trusts and purposes aforesaid unto the *Middlesex Hospital*, that institution being empowered by law to receive the same:—

Held, that the bequest to the six hospitals included impure personalty, and that such impure personalty must be applied as far as possible in payment of the shares of those of the six hospitals which had power to take and hold land.

THIS was the further consideration of a suit for the administration of the estate of *George Nicholl*, who, by his will, dated the 20th of February, 1856, after directing payment of his debts out of his personal estate, and making certain specific bequests, and giving two pecuniary legacies of £2000 and £500, devised and bequeathed his real and personal estate to trustees upon certain trusts during the life of his sister *Mary Nicholl*; and from and after her decease upon trust, by and out of such part of his personal estate as might not be legally applicable to the trusts thereinafter declared, in favour of the hospitals and charitable institutions thereinafter mentioned (other than the *Middlesex Hospital*), and in case the same should be insufficient for such purpose, then by and out of any other part of his personal estate, to levy and raise two sums of £5000 each, to be held upon the trusts thereby declared; and subject and without prejudice to the trusts aforesaid, the testator directed that the trustees or trustee for the time being of his will should, from and after the decease of his said sister, stand and be seised and possessed of and interested in all his said real and residuary personal estate upon the following trusts:—

"Upon trust that they the said trustees or trustee shall and do,

by, with, and out of such part of my said residuary personal estate as may be legally applicable to such purposes, pay to each of the four several charitable institutions next hereinafter mentioned the legacy or sum of £500 a piece (that is to say):

"1. The *Royal Naval Female School* at *Richmond*, towards the building fund.

"2. The *Metropolitan Convalescent Hospital, Walton-upon-Thames.*

"3. The *Margate Infirmary*, and

"4. The *Sussex County Hospital, Brighton.*

"And shall and do pay and apply all the rest, residue, and remainder of my personal estate and effects which may be legally applied for such purposes unto and equally between the six next hereinafter named hospitals (that is to say):

"1. *St. George's Hospital, Grosvenor Place, Hyde Park.*

"2. *Westminster Hospital, Broadway, Westminster.*

"3. *University Hospital, University Street, St. Pancras.*

"4. *King's College Hospital, Portugal Street, Lincoln's Inn Fields.*

"5. *St. Mary's Hospital, Cambridge Place, Paddington*, and

"6. *Charing Cross Hospital.*

"And I direct my said estate and effects shall be so marshalled and administered as to give the fullest possible effect to the pecuniary and residuary legacies and bequests hereinbefore contained in favour of the said several hereinbefore named hospitals and other charitable institutions.

"And subject and without prejudice to the trusts aforesaid, I direct that they the said trustees or trustee shall and do, from and after the decease of my said sister *Mary Nicholl*, convey, surrender, assign, and transfer all and singular my said residuary freehold and copyhold estates, and also all the rest, residue, and remainder of my said residuary and personal estate and effects which shall not be applicable to and be applied to the trusts and purposes aforesaid, unto the *Middlesex Hospital*, their successors and assigns, they being incorporated and empowered by Act of parliament to receive the same."

The testator died on the 14th of December, 1859; his sister *Mary Nicholl* died on the 25th of October, 1868.

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The testator left pure personalty to the value of about £43,000, and impure personalty to the value of about £18,000.

St. George's Hospital and the *Westminster Hospital* are empowerd to take and hold lands notwithstanding the *Statute of Mortmain* (9 Geo. 2, c. 36); the other four of the six hospitals named in the bequest of the testator's residuary personal estate have no such power. The *Middlesex Hospital* is so empowered.

The question was whether the six hospitals were to any and what extent entitled to the testator's impure personalty.

Mr. *Southgate*, Q.C., and Mr. *Marten*, for the Plaintiff, the surviving trustee of the will.

Mr. *R. Swan*, for the Defendant, who was interested in one of the sums of £5000 directed to be raised.

Mr. *Roxburgh*, Q.C., and Mr. *F. J. Wood*; Mr. *Fischer*, Q.C., and Mr. *Goren*; Sir *R. Baggallay*, Q.C., and Mr. *Bagshawe*; Mr. *W. Pearson*, and Mr. *Graham Hastings*, contended that the costs of suit and pecuniary legacies must, in the first place, be paid out of the impure personalty, which would thus be reduced to the value of less than £5000; that the impure personalty remaining must then be divided equally between *St. George's* and *Westminster Hospitals*, and the pure personalty then distributed among the six hospitals; so that, after allowing for the shares of impure personalty taken by *St. George's* and *Westminster Hospitals*, all six might be equally benefited.

Mr. *Fry*, Q.C., and Mr. *Chitty*, for the *Middlesex Hospital*, admitted that the costs and legacies must be paid in the first instance out of the impure personalty; but contended that the gift to the six hospitals was confined to pure personalty.

LORD ROMILLY, M.R.:—

I think the meaning of this bequest is very clear. The plain intention of the testator was this: "I intend to give my personal estate in this manner; out of that portion of it which is applicable strictly for that purpose"—namely, the pure personalty—"I give the sum of £500 a piece to four institutions." Then I take his exact words: "And shall and do pay and apply all the rest,

residue, and remainder of my personal estate and effects;" that is, everything that he has, of every sort, both pure and impure, and if it had been given to *A. B.*, *A. B.* would have taken the whole; but then the testator says, "which may be legally applied for such purposes unto and equally between the six next hereinafter named hospitals"—that is, the whole of the personalty, both pure and impure, which may be applicable for any one of those hospitals, is given to them. Now, there are two of them that may take land—one is the *St. George's*, the other is the *Westminster*. Then the whole of the pure and impure personalty which is the subject matter of the gift, is given equally between them all. The effect of that would be, first, that each would take one-sixth of the whole. But then he does not mean that, for he says, "I desire you shall give it effect in this way, that you shall not diminish any of the amounts." Therefore what you must do is, first ascertain what one-sixth of the remainder of the pure and impure personalty amounts to, give that one-sixth out of the impure personalty to the *Westminster Hospital*, another one-sixth in like manner to *St. George's Hospital*, and if that exhausts the whole of the impure personalty, give the remainder of the pure personalty to the other four. If it does not, then of course there is a portion which would be set loose, and which you could not give. But as far as you can make it equal, the intention and will of the testator is that it shall be so arranged that each of them shall take equally, by giving to those who can take land that portion which consists of land, and as far as possible making up an equality with the others out of the pure personalty. I am of opinion that is the meaning of the clause. You must pay the legacies first of all out of the impure personalty, and then I think you must provide for all the costs of the suit; and which should be borne in proper proportions between the land and the personalty; the real and personal estate paying according to their proportion.

Solicitors: Messrs. *Pattison, Wigg, & Co.;* Messrs. *Cookson, Wainwright, & Pennington;* Messrs. *Fladgate, Clarke, Smith, & Forster;* Messrs. *Palmer, Nettleship, & Eland;* Messrs. *Kempson & Co.;* Messrs. *Tatham & Son;* Messrs. *Gadsden & Treherne;* Messrs. *Hallowes, Price, & Hallowes.*

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1872
June 3, 4.

WILKINSON *v.* BARBER.

[1870 W. 254.]

Will—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Gift to existing Charity—Objects of Charity—Acquisition of Land—Discretion of Trustees—Pure and Impure Personalty—Payment of Legacy Duty—Costs.*

A bequest of pure personalty to an existing charity, the application of the funds of which rests in the absolute discretion of the trustees thereof, is good, although some of the objects of the charity may involve the acquisition of land.

The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personalty.

Next of kin appearing in opposition to a charitable bequest, and failing, *held* not entitled to costs as between solicitor and client.

Carter v. *Green* (1) not followed.

THIS was the further consideration of a suit for the administration of the estate of *Samuel Bailey*, who by his will, dated the 1st of October, 1860, appointed *James Henry Barber* and *William Fisher* executors of his will and trustees for the purposes hereinafter mentioned, and directed payment of his just debts and funeral and testamentary expenses out of the money to arise from the sale of his freehold and leasehold hereditaments and premises hereinafter devised and bequeathed upon trust for sale in exoneration therefrom of his pure personal estate; and after making some specific devises and bequests, the testator devised all the residue of his real estate, and all his leasehold estates, and all such parts of his personal estates as might not lawfully be appropriated to charitable purposes, unto and to the use of his said trustees, their heirs, executors, administrators, and assigns, upon trust to sell the same in manner therein mentioned, and out of the proceeds of such sale, in the first place, to pay the expenses of and incident to such sales, and, subject thereto, to pay (so as to exonerate therefrom all his pure personalty) his just debts and funeral expenses, and all the expenses of and incident to proving his will and the administration of his whole estate, both real and personal, and the legacy and succession duty on all his bequests, which he declared

(1) 3 K. & J. 591.

should be free of legacy and succession duty, and, subject thereto, upon trust to pay the pecuniary legacies therein mentioned; and in case there should be any surplus of the moneys to arise from such sale, after satisfying all the purposes aforesaid, the testator bequeathed the same to the said *James Henry Barber* and *William Fisher* in equal shares as tenants in common, for their own absolute use and benefit; but if such moneys should be insufficient to satisfy the several purposes aforesaid, the deficiency was to be satisfied and made good out of the residue of his personal estate thereinafter bequeathed. The testator then bequeathed all the residue and remainder of his personal estate not thereinbefore disposed of, and which might be lawfully appropriated for charitable purposes, to his said trustees, their executors, administrators, and assigns, upon trust to convert into money all such parts thereof as should not consist of money; and he declared that so much thereof as should consist of money and the moneys to arise from the conversion of such parts thereof as should not consist of money should be held upon trust to pay the five charitable legacies therein mentioned; and, subject as aforesaid, he declared that all the residue of his personal estate not thereinbefore bequeathed, and which might be lawfully appropriated for charitable purposes, should be in trust for and paid and transferred to the town trustees of *Sheffield*, and that they should stand possessed thereof upon trust to invest the same in the public funds of *Great Britain*, or in such other manner as they could lawfully invest the trust moneys belonging to them, and upon trust to apply the annual income thereof for such objects of public utility in *Sheffield*, or for such other charitable purposes (not being of an ecclesiastical nature) as the general annual income of the trust funds belonging to them as such trustees in trust for the town of *Sheffield* as aforesaid were applicable.

The testator died on the 18th of January, 1870, leaving pure personalty to the amount of upwards of £90,000.

The town trustees of *Sheffield* are an unincorporated body of very considerable antiquity, and are entrusted with trust funds of considerable amount. The income of such trust funds is applicable, in the judgment and at the discretion of the trustees, to charitable and public purposes in or for the benefit of the town of *Sheffield*, and during the last twenty years had been applied for many

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different purposes, some of which (as the widening and improvement of streets) involved the purchase of land, but others did not. The questions were, first, whether the residuary bequest of pure personalty to the town trustees of *Sheffield* was good; secondly, if it were, whether the legacy duty thereon was properly payable out of the impure personalty.

Sir *R. Baggallay*, Q.C., and Mr. *Waller*, for the Plaintiffs, the town trustees of *Sheffield*:—

The Plaintiffs have an absolute discretion as to the mode in which they are to apply the funds in their hands. They may therefore apply this bequest in manner consistent with the Statutes of Mortmain; and the gift therefore is good: *University of London* v. *Yarrow* (1).

As to the legacy duty, it will be contended that it is an accretion to the legacy, and that inasmuch as a charity legacy cannot be paid out of impure personalty, so neither can the duty thereon. Admitting that the legacy duty is an accretion to the legacy, still it is payable, not to the charity, but to the State, and therefore does not fall within the provisions of the *Mortmain Act*.

Mr. *Southgate*, Q.C., and Mr. *W. Pearson*, for the trustees and executors, referred to *Noel* v. *Lord Henley* (2), as shewing that the legacy duty must be treated as an accretion to the legacy, and must be paid out of the same fund as the legacy itself.

8 K.D. 586

The MASTER OF THE ROLLS said he was clearly of opinion that a direction that a charitable legacy should be free of duty was a disposition "for the benefit" of the charity, and fell within the terms of the *Mortmain Act* (9 Geo. 2, c. 36, s. 1), and consequently, that the legacy duty on the charitable legacies could not be paid out of impure personalty.

Mr. *Fry*, Q.C., and Mr. *Chapman Barber*, for the next of kin of the testator:—

In determining the validity of a gift of this sort the intention of the testator must be ascertained quite irrespective of the *Statute of Mortmain*; and if, when this has been done, it is found that the carrying of his intention into effect would infringe the provisions of

(1) 1 De G. & J. 72. 3 Jur. N.S. 421 (2) 7 Price, 241.

the statute, the gift is bad: *Martin* v. *Wellstead* (1). The objects for which the trust funds belonging to the town trustees of *Sheffield* are applicable — or at all events, the most important of such objects—involve the purchase of land; and but for the *Statute of Mortmain* there can be no doubt that the testator's intention would be held to be that the Plaintiffs might apply the bequest for such purposes: *Longstaff* v. *Rennison* (2). In order to make the gift valid the testator ought to have used words excluding the application of the money in the acquisition of land: *In re Watmough's Trusts* (3); *Hawkins* v. *Allen* (4); *Pratt* v. *Harvey* (5). In fact, you must treat the case as if all the objects for which the trust fund is applicable were set out in the will; and inasmuch as the more important objects involve the acquisition of land, the Court must hold either that the gift is void *in toto*, or that it must be apportioned among the several objects in the proper proportions attributable thereto, or, if these proportions cannot be ascertained, then equally among them: *Hoare* v. *Osborne* (6).

They asked for costs as between solicitor and client, whatever the decision might be, as they were next of kin, raising a not unreasonable contention, and said that rule had been acted on in *Carter* v. *Green* (7).

The MASTER OF THE ROLLS said that he knew of no such rule, and could not act upon it.

Mr. *Hemming*, for the Attorney-General, mentioned *Lewis* v. *Allenby* (8), as illustrating the well-settled rule, that where trustees had discretionary powers enabling them to apply a fund either on legal or illegal purposes, they were bound to adopt the former, and a bequest to them would therefore be valid.

June 4. LORD ROMILLY, M.R.:—

I am of opinion that this bequest to the town trustees of *Sheffield* is good. It is a bequest of pure personalty, and the charity has a great number of different objects, some of which are perfectly free

(1) 23 L. J. (Ch.) 927.
(2) 1 Drew. 28.
(3) Law Rep. 8 Eq. 272.
(4) Ibid. 10 Eq. 246.
(5) Law Rep. 12 Eq. 544.
(6) Ibid. 1 Eq. 585.
(7) 3 K. & J. 591.
(8) Law Rep. 10 Eq. 668.

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from objection on the ground of the *Mortmain Act*, though others are not. It is quite settled, no doubt, that if a testator leaves property, and specifies that certain things are to be done with it, some of which are legitimate and others are not, the Court will not carry into effect any part of the legacy if it is unable to distinguish what part is meant for each; but if it can do so—if, for example (as was the case of *Hoare* v. *Osborne* (1), which was cited to me), one of three different objects is legal and the other two are not, the Court divides it into equal thirds; or if the testator specifies what the portions are to be, the Court gives effect to his wishes. Those are cases where the testator positively directs that his property shall be so applied; but I never heard that, where a gift is made to a charity, which charity has power to employ it upon trusts, some of which may be legal and some of which may be illegal, the whole legacy is void, because the charity may possibly dispose of it in a manner which, if it were specifically pointed out, would not be legal. For instance, assume that *King's College Hospital* wanted an additional wing, and that subscriptions were invited for that purpose, and then a person left a legacy to the hospital without saying anything more than that he gives this legacy, cannot the hospital accept it, and cannot the hospital employ it in any manner which may be thought fit? I think it would be the legitimate right of the hospital to do so. Still more is this the case when there is an absolute discretion in the trustees of the charity to dispose of the funds as they think fit. There are objects here which are perfectly legitimate; why cannot the trustees employ this bequest for these objects? Then as to the other objects, whatever other property they have they may dispose of it for those if they think fit. I have no doubt that this is a perfectly good legacy, and I shall so hold.

The other part of the case I disposed of yesterday. I have considered it again, and I am confirmed in the view I then took. I do not think that the legacy duty can be charged on the impure personalty.

Solicitors: Mr. *J. W. Hickin*, agent for Messrs. *Vickers & Son, Sheffield;* Messrs. *Sharpe, Parkers, & Co.;* Messrs. *Cowdell & Co.;* Messrs. *Raven & Bradley.*

(1) Law Rep. 1 Eq. 585. 12 Jur. N.S. 243.

BIRKS *v.* SILVERWOOD.

V.-C. M.
1872
March 20.

Appeal from County Court—Transfer to Court of Chancery—28 & 29 Vict. c. 99, s. 9.

A plaint in the County Court for the administration of an estate, stated that the value of the property did not exceed £500. At the hearing an application, of which notice had been given, was made by the Defendant that the plaint might be struck out, on the ground that the estate exceeded £500; and the Court had consequently no jurisdiction. The Judge, after hearing evidence in proof of the excess of value, ordered the suit to be transferred to the Court of Chancery, under the 9th section of the *County Court Act*:—

Held (affirming the order), that the suit was "in progress" within the meaning of the 9th section; and the value of the property appearing to be under £700, directions were given that the suit should be proceeded with in Chambers, as upon an administration summons.

THIS was an appeal from the County Court of *Yorkshire*, holden at *Doncaster*.

John Harrison, by his will, dated the 11th of January, 1869, gave, devised, and bequeathed all his real and personal estate and effects to his friend *Emma Silverwood*, her heirs, executors, administrators, and assigns, absolutely; and he appointed *E. Silverwood* sole executrix of his will.

J. Harrison died on the 25th of September, 1870, and his will was proved by *E. Silverwood* on the 12th of November, 1870, the personal estate of the testator being sworn under £450.

A meeting of the testator's creditors took place on the same 12th of November, when it was resolved that the executrix should convey the estate and effects to a trustee for the benefit of the creditors, and that out of the assets *E. Silverwood* should receive £100.

Subsequently to the above meeting of creditors, and before the filing of the plaint, the decision in which was now questioned, an error was discovered in calculating the value of the personal estate of the testator, and it turned out that such estate exceeded in value £500, and additional probate duty was thereupon paid.

The Plaintiffs, Messrs. *Joseph* and *Thomas Birks*, creditors of the testator, filed their plaint in equity in the County Court on the

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5th of December against *Emma Silverwood* for the administration of the estate, and it was therein stated that the whole of the real and personal property of the testator did not exceed £500.

On the 24th of December a notice was served upon the Plaintiffs by the solicitors of *Emma Silverwood,* that upon the hearing of the plaint an application would be made to the Court on behalf of the Defendant that the said plaint might be ordered to be struck out and removed from the file, or be dismissed with costs, on the ground that, as the personal estate exceeded the sum of £500, the Court had no jurisdiction to hear and determine it.

When the plaint came on to be heard before *Richard Wildman,* Esq., the Judge, on the 5th of January, 1871, the Defendant's attorney insisted upon the objection that the Court had no jurisdiction to entertain or proceed to hear or determine the plaint.

The excess in point of amount was then proved by a witness examined on behalf of the Defendant.

The Defendant's attorney thereupon applied to have the plaint struck out with costs, but the Judge made the following order:—

"Whereas, it appearing that the subject-matter of this suit exceeds in amount the sum of £500, it is ordered that the suit be transferred to the High Court of Chancery."

The following were the grounds of appeal as set forth on behalf of the Defendant:—

First: That the Court and the Judge had no power, authority, or jurisdiction to make the above order.

Secondly: That the suit was not at any time "in progress" in the Court within the meaning of the 9th section of the Act 28 & 29 Vict. c. 99 (1), so as to make it the duty of the said Court to direct that the suit be transferred to the Court of Chancery.

Thirdly: That the Defendant always objected to the jurisdiction

(1) 28 & 29 Vict. c. 99, s. 9: "If during the progress of any suit or matter it shall be made to appear to the Court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made; but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellor's Courts as the Lord Chancellor may by General Order direct, and such Vice-Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred."

of the Court, and gave notice of such objection to the Plaintiffs, wherefore the Court ought to have dismissed the suit and ordered the plaint to be removed from the file of the Court.

Fourthly: That the provisions contained in sect. 9 of 28 & 29 Vict. c. 99 were intended to apply to cases where suits had been commenced in the County Court in good faith and under a belief by all parties thereto that such Court had jurisdiction to entertain the same, and where it was subsequently ascertained in the course of the proceedings that the subject-matter of such suit exceeded the limit in point of amount to which the jurisdiction of the Court extended; and not to cases where the jurisdiction of the Court was disputed by the Defendant in the first instance, and no order, determination, or direction therein had been made originally by the Court.

The question for the opinion of the Vice-Chancellor now was, whether, under the circumstances, it was competent for the Judge of the County Court to direct that the suit should be transferred to the Court of Chancery. And the Vice-Chancellor was asked to make such decree or order, and to give such directions as His Honour should think fit.

Mr. *Glasse*, Q.C., in support of the appeal:—

The objection to this plaint was stated to the Plaintiff before the suit came on for hearing. Upon its being called on in Court the objection was formally made, and was, in effect, a plea to the jurisdiction of the Judge. The Act only gives the County Court jurisdiction in cases where the property is under £500, consequently the Judge never had jurisdiction, and the suit never was "in progress." The statement of amount in the plaint is a false statement, and this was known to all the parties before the suit came on for hearing. The Act must have been intended to apply to cases in which, upon taking the accounts after a decree, it turns out that the amount of property exceeds what the parties honestly believed to be the value, and not to cases where the amount is ascertained before the hearing of the plaint. It would open the door to many abuses if such cases were transferred to this Court. Any person might falsely allege the amount of property to be under £500, and file a plaint in the County Court for

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the purpose of getting the suit transferred into Chancery. The inconvenience of this course is apparent, since the short process adopted in the County Court is not suited to the more elaborate process by which causes are brought to a hearing in this Court, and the consequence will be that a bill must be put upon the file.

Mr. *Jackson*, for the Respondent:—

The only question is, whether the excess of property appeared during the progress of the suit. The decree would have been a matter of course if the property had been under £500; all parties believed at first that it was so. The estate was sworn under £450 by the Defendant herself, and the creditors, when they met to consider what course should be taken, believed that this was the value. It was only by an error subsequently discovered in calculating the value that the excess became apparent. The plaint was therefore filed in perfectly good faith, and without the slightest intention to deceive or mislead the Court. The excess in value could not have been distinctly within the knowledge of the Plaintiffs. When the plaint was being heard the Judge decided upon receiving evidence as to the value of the property, and it was then for the first time proved that the amount exceeded £500. If the Legislature intended that the excess in value could only be proved upon taking the accounts after decree, the Act would have so stated it. There are many cases in which there is no necessity for accounts, as, for instance, in a suit for specific performance. The suit was, to all intents and purposes, in progress when the excess was discovered, and the Judge was bound, under the Act, to direct the transfer. As to carrying on the suit in the Court of Chancery, there is no difficulty whatever. The forms used in the County Court may easily be adapted to any form of suit.

Mr. *Glasse*, in reply.

Sir R. Malins, V.C.:—

The question upon this appeal is, whether the Judge of the County Court was justified in making an order for transfer of the plaint to the Court of Chancery. In the first place, I am of opinion that the fact of the excess of value did appear during the progress

of the suit. I admit that if, on the face of the proceedings, the value of the property had appeared to be in excess of the sum which gives the County Court jurisdiction, then the Judge ought to have dismissed the plaint; and suppose the plaint had been filed for specific performance of a contract to purchase an estate, and the purchase-money was above the sum of £500, then the same principle would apply, and it would follow that the plaint should be dismissed; but if the contract were to purchase an estate at a sum to be fixed by arbitration, then the amount would not appear upon the face of the proceedings, and it would be the duty of the County Court Judge, as soon as the price was found to exceed £500, to stop the proceedings in the suit, and order a transfer to the Court of Chancery. The whole question turns upon the meaning of the 9th section of the County Court Act. The words are, "If during the progress of any suit or matter it shall be made to appear that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is limited." I think it quite plain that the amount of property was made to appear after the suit had been commenced, and therefore while it was 'in progress;" and that being so, what was the course to be taken by the Judge? The words of the section are: "It shall be the duty of the Court to direct" a transfer of the plaint to the Court of Chancery. Then it was the duty of the Judge to transfer the suit, and he had no other course to pursue than what he actually did. He was right, therefore, in making the order of transfer.

It has been suggested that difficulties will arise in carrying on the proceedings in Chancery, and that the Court must order a bill to be filed; but I confess that I see no difficulty in the matter. The Act says, "that the Vice-Chancellor shall have power to regulate the whole of the procedure in the suit so transferred. Suppose the plaint had been filed in a matter involving a large amount of property, and it appeared that the most convenient form of procedure would be by bill, then it would be competent for this Court to direct that a bill should be filed, and I should have no hesitation in doing so; but here the plaint is in the nature of a common administration summons, such as we have instances of in great numbers. I cannot, therefore, see any difficulty likely to arise from it. My opinion is, that the Judge was perfectly

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right in transferring the suit to this Court, and the appeal must be dismissed with costs.

Now, under these circumstances, what directions am I to give as to the regulations of the procedure. The value of the property appears to be under £700, therefore it is a case which may very properly go on in Chambers in the common way until it shall appear that any difficulty arises; and I shall direct the proceedings to be continued as if an administration summons had been taken out, and it must proceed as if filed on the day of transfer to Chambers. In other words, it will commence from this day.

Solicitor for the Appellant: Mr. *Redhead.*
Solicitors for the Respondent: Messrs. *Pattison, Wigg, & Co.*

V.-C. M. 1872 *May* 1, 2, 6, 7.

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[1867 M. 111.]

*Voluntary Settlement—Creditor's Suit—Settlor about to engage in Trade—Liabilities incurred since Date of Settlement—*13 *Eliz. c.* 5*—Inspectorship Deed—Release—Concealment.*

1 Ch D 639.
36 Ch D 300
19 Ch D 589
592-594-5
599-601
21 Ch D 78

A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect.

Where a voluntary settlement is made on the eve of the settlor engaging in trade the burden rests upon him of shewing that he was in a position to make it.

In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to shew that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.

A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed.

THIS was a suit praying that a voluntary settlement effected by two deeds of the 24th of February, 1864, might be declared void

as against the creditors of the settlor under the Act of 13 *Eliz.* c. 5, and for consequential relief.

The Plaintiffs sued on behalf of themselves and all other creditors of the settlor, and the Defendants were the settlor and the trustees of the settlement. *William Douglas,* the settlor, was originally a merchant's clerk, and his salary, which had been gradually raised from £200 a year, amounted in the year 1864 to £500 a year. He was then a managing clerk in a firm of merchants carrying on business in *London* and *Liverpool,* and also, in partnership with other persons, at *Calcutta.* The style of the *London* firm was *James Smith & Co.;* that of *Liverpool, William Grant & Co.;* and that of *Calcutta, Grant, Smith & Co.* The principal members of the firm were, at the time, *James Smith* and *William Grant,* and there was also a partner named *James Steel,* and other persons were interested in some of the branches of the business.

The Defendant *Douglas* had married about the year 1858; at the date of the settlement in question in the suit he had no children, but one was born shortly afterwards. At the time of his marriage he had no property capable of being put into settlement, but according to his statement he had by the year 1863 saved, out of his salary, and certain sums which had been given him out of the profits of certain transactions in jute which he had conducted on behalf of his employers, sufficient money to enable him to purchase the lease of a house at *Islington,* in which he intended to reside, known as No. 28, *Highbury Hill.* He at all events did purchase the lease, which was now valued at about £1800. He signed the contract on the 30th of October, 1863, and the assignment to him was made on the 2nd of November, 1863.

In the latter months of the year 1863 negotiations were commenced between the partners, *James Smith* and *William Grant,* for the purpose of enabling *William Grant* to retire from the partnership; and it was also arranged between *James Smith* and *William Douglas* that if the proposal were carried out the latter would be taken into the partnership. The matter was so far arranged that an agreement was signed on the 1st of October, 1863, by *William Grant* and *James Smith,* which provided that *William Grant* should retire, and *James Smith* pay him £70,000 for his interest in the business. Some difficulty, however, arose in finding the £70,000,

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and the arrangement was not concluded at the time. The Plaintiffs, however, sought to establish as part of their case that the admission of Mr. *Douglas* as a partner was virtually determined upon before the close of the year 1863. For this conclusion they relied, amongst other things, upon a letter written by Mr. *Douglas* to Mr. *Smith*, on the 11th of September, 1863, in which the following passage occurred: "I am much obliged for the inquiry in the latter part of your note. *Grant* writes me that he will be in town on Wednesday, when he also expects to see you here, and I will then speak to you fully on the subject. If *Grant* retires altogether from *Calcutta* business I would be very glad indeed if you could come to an arrangement with me here. But I have still my doubts whether *Grant* will retire; only there has been so much lately of deciding one way, and then deciding in another, that I had made up my mind to wait quietly till something was actually agreed upon."

These arrangements, however, remained unconcluded; and in the meantime, on the 19th of January, 1864, the Defendant *Douglas* had some conversation with his solicitors with respect to making some settlement on his wife and family; and on the 24th of February following he gave them complete instructions to prepare a settlement of his leasehold house. This was effected by means of two indentures, both dated the 24th of February, 1864, by the first of which, after reciting that he was desirous of making some provision for his wife, he, in consideration of natural love and affection for her, assigned the leasehold house to the three remaining Defendants as trustees, with a discretionary trust for sale, and to hold the house, or the proceeds of the sale of it, upon the trusts of the indenture of even date. These trusts were, in substance, for his wife for life for her separate use, and after her death, if he should not have become bankrupt or have incumbered the same, to pay the income to himself until he should be outlawed or become bankrupt, or should assign, charge or incumber, or attempt or affect to assign, charge or incumber, the dividends, interest and income, or some part thereof; or should or might suffer something whereby the same or some part thereof might through his act or default, or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other

person or persons; and a discretionary trust was given to the trustees as to the application of the income in case of the determination of the trust during his life. Then followed the usual trusts in favour of the children of the marriage, and an ultimate trust for the Defendant *Douglas*, his executors or administrators absolutely.

These deeds were executed, on or about the day on which they were dated, by *Douglas* and the trustees. On the 8th of April, 1864, the partnership arrangements were completed as far as the *London* and *Liverpool* firms were concerned, and by a deed of that date made between *James Smith*, who was the only continuing partner, and himself (it being provided that the remaining English partner, *James Steel*, should retire at the end of the year,) he became a partner in those firms for three years from the 1st of May, 1864.

On the 1st of May, 1864, the Defendant *Douglas* left *England* for *Calcutta*, with the view of taking the chief management of the branch of the business carried on there; and on or about the 8th of August, 1864, a deed was executed in *India* by means of which he became a partner in that firm also, and he remained in *India* till the early part of the following year.

The firms in *England* soon became embarrassed, their difficulties arising principally, according to the statement of the Defendant *Douglas*, from injudicious management, during his absence in *India*, of some speculations in jute, which had been commenced before he became a partner and for which he considered that he was not personally responsible; and in November, 1864, it became necessary for them, if they were to continue their business, to raise a sum of £40,000. This sum was raised under an agreement dated the 14th of November, 1864, by which the late partner, *William Grant*, mortgaged his interest in 327 *Hooghly Steam Tug Company's* shares, and *James Steel*, who was about to retire, mortgaged certain shares in a tea plantation company and other property, and *William Grant* agreed to become again a partner as from the 1st of January, 1865. On resuming this position *William Grant* went to *Calcutta* to manage the Indian branch of the business, and in February, 1865, the Defendant *Douglas* returned home. He stated in his answer that on his return he discovered that in consequence of the liabilities

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Next, the releases in the deed of inspectorship and the Indian trust deed constitute an absolute bar to the suit, the clear intention being to wind up the estates and leave the partners free.

[They also cited *Holloway* v. *Millard* (1) and *Martyn* v. *M'Namara* (2).]

SIR R. MALINS, V.C.:—

This case raises as important a question, probably, on this branch of the law as has ever been brought before the Court.

The circumstances are very simple. Mr. *Douglas* had been for some years a clerk in various mercantile houses, and in the autumn of 1863 was a clerk to a firm carrying on business in *London*, *Liverpool*, and *Calcutta*, under the names of *William Grant & Co.*, *James Smith & Co.*, and *Grant, Smith, & Co.* His salary, which was for some time £200 a year, had latterly been raised to £500.

In the latter part of the year 1863 his employers were engaged on a very large scale in speculations in jute, which is an article subject to very considerable variations in price. These speculations, which I think were of a reckless and unjustifiable character, were to some extent carried on by the aid of Mr. *Douglas*, and it is not attempted to be denied that he was to some extent interested in the result of them. The Plaintiffs say that he was interested jointly as a partner, and certainly there is a passage in Mr. *Smith's* evidence which seems to sustain that view.

But, though I do not intend to rest my conclusion on any such grounds, it is not unimportant to observe that for several months before the settlement in question was made he was certainly, either on his own account or on account of the firm whose servant he was, engaged in these reckless speculations in jute. In this state of things the firm were carrying on business in *London* and *Liverpool*, and in connection with some other persons in *India*. Of the English partners it is only necessary to refer to Mr. *Smith* and Mr. *Grant*. Proposals had been made for the retirement of Mr. *Grant*, and this business was to be carried on by Mr. *Smith* alone, or with such persons as he should think proper to take into part-

(1) 1 Madd. 414. (2) 4 Dr. & W. 411.

nership with him. It is perfectly plain, for it is shewn under the hand of Mr. *Douglas* himself, that he entertained the expectation of going into partnership with Mr. *Smith*, his employer, if Mr. *Grant* retired. That is very distinctly shewn in a letter so early as the 11th of September, 1863, written by Mr. *Douglas* to Mr. *James Smith*. It gives the particulars of some purchases of jute and so forth, and then he says:—

[His Honour then read the passage in the letter above set out, and continued:—]

So matters went on, and in October, the very next month, Mr. *Douglas*, who in the course of his clerkship had amassed a sum of money which he says amounted to about £3000 or £4000, but which I cannot make out amounted to so much, entered into this transaction. He was a married man, having at the time no child, but in the progress of this business the first child of the marriage was born, and on the 8th of October, 1863, while it appears that he certainly had it in his mind as a probable event that he would go into partnership with his employer Mr. *Smith*, he entered into a contract to purchase a leasehold house, which is the subject of this suit. The contract was on the 30th of October, and the purchase was completed by an assignment to himself on the 2nd of November. All was right so far, and nobody can complain of that part of the transaction. But while he was carrying on the negotiation for the partnership, on the 19th of January, he saw his solicitor, and talked of making, but did not give him positive instructions to make, a settlement of the leasehold house, which was worth from £1500 to £1800. On the 12th of February, 1864, he gave final instructions to his solicitor to prepare a voluntary settlement of that property, and in pursuance of the instructions the settlement was prepared and duly executed on the 24th of February, 1864.

Now the trusts of that settlement were for Mrs. *Douglas* for her life to her separate use in the usual way, with remainder to himself if he should survive her for life, or until he should become bankrupt or insolvent. Then there were the usual trusts for children, and in default of children, to himself absolutely. On the 8th of April following (forty-four days, I think, is the precise time, but it may be called six weeks afterwards,) he entered into partnership

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executed the deed released the Defendant *Douglas* and his separate estate from all demands proveable under the deed. The partnership estates and the private estates of the partners, so far as had been disclosed, had been wound up under the inspectorship deed and in bankruptcy, and the English creditors had been paid a dividend of fourpence in the pound, and there remained a sum in hand sufficient to pay another small dividend. On the 8th of September, 1865, the Plaintiffs gave the Defendant *Douglas* the following letter, signed by them :—

"SIR,—Referring to the deed of arrangement and inspectorship of your firm of *Smith, Douglas, & Company*, we beg to testify to your having conformed thereto and supplied all information required to the present time; and further, to signify our consent to your engaging in any new business or employment on your own account, so far as may not be inconsistent with your aiding and assisting in getting in and winding up the estate of your late firm."

The Defendant *Douglas*, however, did not inform the inspectors of the settlement or the existence of the property comprised in it, and the Plaintiffs wrote the letter of the 8th of September, 1865, in ignorance of its existence.

The Defendant *Douglas* stated by his answer, paragraph 27, that he was at the date of the settlements wholly free from debts or obligations of any kind, except current bills for personal and household expenses of trifling amount, all of which had long since been fully paid and satisfied.

A case was, however, set up by the bill with respect to certain speculations in jute and cotton in which the firm had been engaged previously to his becoming a partner, and in which he was alleged to have been entitled to a share in the profits, and consequently to liability for losses. The speculations had eventually turned out disastrous, and caused a considerable part of the liabilities of the firms. If that case were established there would be a liability still existing, incurred before the date of the settlement. The Defendant *Douglas*, however, denied that he had incurred any liability with respect to these transactions.

The bulk of the evidence, which was very voluminous, related

to this part of the case, but it was not argued out, and for the purpose of the decision it may be considered that there was no debt now owing from the Defendant *Douglas* which had been incurred prior to the date of the settlement now sought to be set aside.

Mr. *Cotton*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Fellows*, for the Plaintiffs:—

It is clearly established by the evidence in this case that at the time the Defendant *Douglas* made this settlement he contemplated becoming a partner in the business, and only six weeks after making it he did actually become such. But if there were any doubt as to his intention the frame of the settlement is such that the Court will presume it. An interest terminable on bankruptcy is just what a man would make who had determined to engage in a hazardous business, and the character of this business must have been well known to the Defendant *Douglas* from knowledge acquired during his clerkship.

Under these circumstances it is quite unnecessary to go into any question whether there is now any liability which was in existence when the settlement was made. A man contemplating going into trade is not allowed to take the bulk of his property out of the reach of his creditors. The principle upon which the case rests was laid down by Lord *Hardwicke* in *Stileman* v. *Ashdown* (1), where he says:—"It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does so with a view to his being indebted at a future time it is equally fraudulent, and ought to be set aside." And the same view was followed in *Taylor* v. *Jones* (2). Where the result fairly to be anticipated follows, the intention to defeat or delay creditors will be presumed, and it is not necessary to shew that there are existing creditors whose debts arose before the settlement: *Ware* v. *Gardner* (3); *Barling* v. *Bishopp* (4). It is quite sufficient that a man is about to enter on a course which may result in liability to bring such a deed within the statute of 13 Eliz. c. 5: *Crossley* v. *Elworthy* (5). In that case one ground

(1) 2 Atk. 477.
(2) Ibid. 600.
(3) Law Rep. 7 Eq. 317.
(4) 29 Beav. 417.
(5) Law Rep. 12 Eq. 158.

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of decision was, that a man had no right to make such a settlement at a time when he had liabilities hanging over his head which might result in insolvency. Where indebtedness at the date of the settlement is not made out the Court may still infer fraud from the facts of the case, as here from the terms of the deed: *Townshend* v. *Windham* (1). The release by the creditors of the Indian firm has no effect against the creditors of the English firms, and if it be said that the Plaintiffs executed that release they did so only as creditors of the Indian firm. If the case as to the jute speculations is gone into it will only be necessary to shew that the Defendant *Douglas* was under some liabilities in respect to transactions which have since resulted in insolvency.

Mr. *Bristowe*, Q.C., and Mr. *Fischer*, Q.C., for the Defendant, *William Douglas*, and the trustees of the settlement:—

The settlement cannot properly be objected to on the ground of the possibility that some liability might arise after its execution, the settlor being free from liability when it was executed; for that was the state of circumstances in *In re Kerrison's Trusts* (2). It is a necessary ingredient in the Plaintiff's case to shew the existence of some liability at the time of the settlement, which has not been discharged. This appears from *Crossley* v. *Elworthy* (3), which is so much relied on by the Plaintiffs. For in the judgment that point is distinctly put forward, and made one of the grounds of the decision. There were in fact two grounds upon which that case rested: the initial indebtedness which continued without intermission, and the occurrence of a liability which, though not anticipated when the settlement was executed, arose out of acts done previously, and was considered to relate back to them. Here not a single debt existing at the date of the settlement has been put into proof since, and, such being the case, the settlement cannot be set aside at the suit of subsequent creditors without proof of actual fraud: *Holmes* v. *Penney* (4); *Skarf* v. *Soulby* (5).

[The VICE-CHANCELLOR:—The question is, whether a man who, within two months of going into business, makes a voluntary settle-

(1) 2 Ves. Sen. 1.
(2) Law Rep. 12 Eq. 422.
(3) Law Rep. 12 Eq. 158.
(4) 3 K. & J. 90.
(5) 1 Mac. & G. 364.

ment, must not be considered to have done so with the intention of delaying his creditors.]

This was a mere expectation, which might or might not be carried out at the date of the settlement, and the contingency of entering into the partnership is too remote to affect its validity. It would be necessary also to establish that the settlor contemplated incurring a loss. The Statute of *Elizabeth* requires the intention to defeat creditors to be shewn, and even if an actual partnership were supposed to raise an implication of such intention that consideration would not apply here. In fact if the deed is avoided on account of the contemplated partnership, it must be shewn that the circumstances are such as would have avoided it if the partnership had not taken effect. The result of the evidence is that it was then improbable that the partnership would take effect.

The rule is that a settlement is good unless one of these cases can be established. Either insolvency must be the necessary result of its execution, as in *Spirett* v. *Willows* (1)—a principle which was discussed in *Freeman* v. *Pope* (2), and was the ground of the decision in *Thompson* v. *Webster* (3)—or, at least, the settlement must be shewn to have been made with a view to the settlor becoming actually indebted to the extent of insolvency: *Stileman* v. *Ashdown* (4); or else there must be some "mark of fraud, collusion, or intent to deceive subsequent creditors": *Townshend* v. *Wyndham* (5), where the distinction between 13 Eliz. c. 5 and 27 Eliz. c. 4 is clearly shewn. When the settlor is not indebted at the time of the settlement fraud must be expressly shewn: *Stephens* v. *Olive* (6); *Kidney* v. *Coussmaker* (7); *Richardson* v. *Smallwood* (8). There was nothing to prevent the Defendant *Douglas* from disposing of the property, and if so, there could be no objection to his settling it. *Barling* v. *Bishopp* (9) and *Ware* v. *Gardner* (10) are clearly distinguishable from the present case, the object of evading a definite liability likely to arise being manifest.

(1) 3 D. J. & S. 293. 11 Jur. N.S. 76
(2) Law Rep. 9 Eq. 206; Ibid. 5 Ch. 538.
(3) 4 Drew. 628. 5 Jur. N.S. 669.
(4) 2 Atk. 477.
(5) 2 Ves. Sen. 1.
(6) 2 Bro. C. C. 90.
(7) 12 Ves. 136.
(8) Jac. 552.
(9) 29 Beav. 417. 6 Jur. N.S. 813
(10) Law Rep. 7 Eq. 317.

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Next, the releases in the deed of inspectorship and the Indian trust deed constitute an absolute bar to the suit, the clear intention being to wind up the estates and leave the partners free.

[They also cited *Holloway* v. *Millard* (1) and *Martyn* v. *M'Namara* (2).]

SIR R. MALINS, V.C.:—

This case raises as important a question, probably, on this branch of the law as has ever been brought before the Court.

The circumstances are very simple. Mr. *Douglas* had been for some years a clerk in various mercantile houses, and in the autumn of 1863 was a clerk to a firm carrying on business in *London*, *Liverpool*, and *Calcutta*, under the names of *William Grant & Co.*, *James Smith & Co.*, and *Grant, Smith, & Co.* His salary, which was for some time £200 a year, had latterly been raised to £500.

In the latter part of the year 1863 his employers were engaged on a very large scale in speculations in jute, which is an article subject to very considerable variations in price. These speculations, which I think were of a reckless and unjustifiable character, were to some extent carried on by the aid of Mr. *Douglas*, and it is not attempted to be denied that he was to some extent interested in the result of them. The Plaintiffs say that he was interested jointly as a partner, and certainly there is a passage in Mr. *Smith's* evidence which seems to sustain that view.

But, though I do not intend to rest my conclusion on any such grounds, it is not unimportant to observe that for several months before the settlement in question was made he was certainly, either on his own account or on account of the firm whose servant he was, engaged in these reckless speculations in jute. In this state of things the firm were carrying on business in *London* and *Liverpool*, and in connection with some other persons in *India*. Of the English partners it is only necessary to refer to Mr. *Smith* and Mr. *Grant*. Proposals had been made for the retirement of Mr. *Grant*, and this business was to be carried on by Mr. *Smith* alone, or with such persons as he should think proper to take into part-

(1) 1 Madd. 414. (2) 4 Dr. & W. 411.

nership with him. It is perfectly plain, for it is shewn under the hand of Mr. *Douglas* himself, that he entertained the expectation of going into partnership with Mr. *Smith*, his employer, if Mr. *Grant* retired. That is very distinctly shewn in a letter so early as the 11th of September, 1863, written by Mr. *Douglas* to Mr. *James Smith*. It gives the particulars of some purchases of jute and so forth, and then he says:—

[His Honour then read the passage in the letter above set out, and continued:—]

So matters went on, and in October, the very next month, Mr. *Douglas*, who in the course of his clerkship had amassed a sum of money which he says amounted to about £3000 or £4000, but which I cannot make out amounted to so much, entered into this transaction. He was a married man, having at the time no child, but in the progress of this business the first child of the marriage was born, and on the 8th of October, 1863, while it appears that he certainly had it in his mind as a probable event that he would go into partnership with his employer Mr. *Smith*, he entered into a contract to purchase a leasehold house, which is the subject of this suit. The contract was on the 30th of October, and the purchase was completed by an assignment to himself on the 2nd of November. All was right so far, and nobody can complain of that part of the transaction. But while he was carrying on the negotiation for the partnership, on the 19th of January, he saw his solicitor, and talked of making, but did not give him positive instructions to make, a settlement of the leasehold house, which was worth from £1500 to £1800. On the 12th of February, 1864, he gave final instructions to his solicitor to prepare a voluntary settlement of that property, and in pursuance of the instructions the settlement was prepared and duly executed on the 24th of February, 1864.

Now the trusts of that settlement were for Mrs. *Douglas* for her life to her separate use in the usual way, with remainder to himself if he should survive her for life, or until he should become bankrupt or insolvent. Then there were the usual trusts for children, and in default of children, to himself absolutely. On the 8th of April following (forty-four days, I think, is the precise time, but it may be called six weeks afterwards,) he entered into partnership

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with Mr. *Smith*. The partnership, in point of profits, was to commence from the 1st of May, that is, Mr. *Grant's* contract was to go out on the 30th of April, and the arrangement between *Smith* and *Douglas* was, that he should succeed on the next day. Accordingly the business begins actively on the 1st of May, 1864, that is, rather more than two months from the time when the voluntary settlement was executed; but it must, for the purpose for which I look at it, be considered as commencing when the articles of partnership were signed.

Mr. *Douglas* went to *India*, and his partner, Mr. *Smith*, remained at home, and whether with the connivance, or approbation, or knowledge of *Douglas*, it seems somewhat uncertain, but it is certain that the business was so conducted that the firm was in difficulties so early as the month of November in the same year. They were borrowing and were embarrassed; the embarrassments so much increased that in the following month of March they failed for the sum of £347,000, and up to this time their dividend has been fourpence in the pound, and I am told that there is a possibility that there may be another penny, so that probably they will not pay sixpence in the pound.

Now to all these proceedings, however innocent Mr. *Douglas* may have been while in *India*, I must regard him as a party, because one partner is liable for the misfeasance of another. One of the most fruitful sources of ruin to men of the world is the recklessness or want of principle of partners, and it is one of the perils to which every man exposes himself who enters into partnership with another.

Now this question seems to me to raise a most important point. Can a man who contemplates trade, or who, in point of fact, whether he contemplates it at the time or very shortly afterwards, enters into trade, and thereby incurs liabilities which end in a disastrous state of affairs, make a voluntary settlement which shall be good against the creditors who become so in the course of his trade? I am not aware of any case upon the exact point, and none was cited, although almost all the cases which have occurred upon the subject were mentioned. But is the Statute of *Elizabeth* so very short in its effect that it will not cover a case where a man on the very eve of entering into trade takes the bulk of his

property and puts it into a voluntary settlement and becomes insolvent a few months afterwards? Is it to be said that such a settlement cannot be reached by any principle of law? I think not. Lord *Langdale* considered the question very fully in *Townsend* v. *Westacott* (1), where the insolvency did not arise until three years after the voluntary settlement was executed; and he there laid down the rule that the burden of proving the position of the parties, and that they were in a position to make a voluntary settlement, was shifted and thrown upon the man who executed the voluntary settlement; and last year I also considered the same subject very fully in *Crossley* v. *Elworthy* (2) where Mr. *Elworthy*, who possessed a very considerable amount of property, considered himself solvent, made a settlement of a large amount, and was in difficulties nine months afterwards. I thought, following the previous decisions, that in that case the whole burden was thrown upon him of shewing that he was not only solvent but in a situation to justify his making a voluntary settlement; I say, in the same way, that Mr. *Douglas*, having become bankrupt or insolvent within seven months after the execution of the settlement, has the burden cast upon him of shewing, not merely that he was solvent, but that he was in a situation which justified him in making a voluntary settlement of the great bulk of his property. I carried the principle somewhat further perhaps in *Crossley* v. *Elworthy* than the previous decisions, because I did not treat it as turning on the mere question of solvency or insolvency, but I said (3), "If a man does under such circumstances"—that is, when it is doubtful whether he is in a solvent condition, and, if so, uncertain whether he is likely to remain so—"make a settlement, it seems to me in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed." [His Honour then referred shortly to the facts of the present case, and continued:—] I am satisfied from the evidence that Mr. *Douglas* contemplated a partnership, and that the probability of such a partnership was the inducement to him to make the settlement. He had very likely never heard of the Statute of *Elizabeth*; but taking a common

(1) 2 Beav. 340; 4 Beav. 58. (2) Law Rep. 12 Eq. 158.
(3) Law Rep. 12 Eq. 168.

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business-like view of the matter, and considering the rather reckless nature of the business into which he was entering, he wished to make a provision out of the leasehold house which he had bought for his wife and any children he might have. I cannot hesitate to come to the conclusion that the inducement to him to make this settlement on the very eve, as I consider it, of his going into business was to protect this property from any risk.

Many cases have been cited. It is not at all necessary to shew that a man had any fraudulent intent in making a settlement as the law is now settled. It is very true that some of the old authorities cited by Mr. *Fischer*, particularly *Stileman* v. *Ashdown* (1), and many of the decisions long after that, proceeded upon the assumption that the settlement could not be set aside unless there was an intention to defraud, because the words of the statute are, "with intent to defraud, defeat, or delay creditors." But that has been long got rid of, and it is not necessary now to shew that. The statute speaks of cases where the creditors "are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded," and it is not necessary to shew an intention to do that, because if the settlement must have that effect the Court presumes the intention and will attribute it to the settlor. That is distinctly laid down by the present Lord Chancellor, on appeal from Vice-Chancellor *James*, in *Freeman* v. *Pope* (2). I acted upon that principle in *Crossley* v. *Elworthy* (3), where I expressly gave Mr. *Elworthy* the benefit of my opinion, that he did not intend to commit a fraud, but as the settlement had the effect of defeating or delaying his creditors I attributed the fraudulent intention to him within the meaning of the statute, and set the settlement aside. So I dare say that Mr. *Douglas* had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this statute, committed a fraudulent act, because, going into trade, he was taking away the only property which would be available for his creditors.

This happens to be a small amount of property with reference to the debts incurred, and with reference to the position of Mr.

(1) 2 Atk. 477.

(2) Law Rep. 9 Eq. 206; Ibid. 5 Ch. 538.

(3) Law Rep. 12 Eq. 158.

Douglas when the settlement was executed. But if I were now to decide against the Plaintiffs my decision would be applicable to any case. Suppose then the case of a man with a large fortune, and having a fancy (and I have known such cases) for going into trade. He says: "I am going into trade; I believe I may make a great deal of money by it, but nobody knows what may happen. Therefore, I will make this large fortune safe by settling it on my wife and children absolutely." The law is perfectly settled that if a man is solvent at the time and after the time of taking away the property which is put into the settlement he remains solvent, and does not at the time contemplate doing anything which could lead to insolvency, that settlement will be good. One of the cases cited, *Holloway* v. *Millard* (1), illustrates that proposition. There a woman had £42,000, and she settled £36,000 on her illegitimate child. There remained £6,000 after taking away the £36,000. She was perfectly solvent, and there was no evidence whatever that she contemplated doing anything in the world that would lead to insolvency. But some years afterwards she became insolvent, and she died insolvent, and the settlement was held to be perfectly good. So, in the present case, if Mr. *Douglas* had neither gone into nor contemplated going into trade at the time, but some years afterwards, by a totally new arrangement, made up his mind to do so, I should have had no hesitation in coming to the conclusion that his subsequent insolvency could have had no effect in producing invalidity of the settlement which he had made upon his wife and family.

The only rule I have found laid down on the subject that commends itself to my judgment, as I think it must commend itself to the judgment of all right-thinking men, is laid down in a very few words by Lord *Hardwicke* in *Stileman* v. *Ashdown* (2). The father there had made a purchase in the name of his son, which was a voluntary settlement, on the principle that if a father buys property in the name of his child it is an advancement to or a settlement on the child. Still the father did acts which were likely to lead to debt, and therefore, on that ground, Lord *Hardwicke* set aside the settlement or provision made by the

(1) 1 Madd. 414.

(2) 2 Atk. 477.

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purchase of a property in the name of the child. Now, what is the meaning of this passage? "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time it is equally fraudulent." Mr. *Bristowe* pressed upon me that it meant he contemplated getting into debt. But I do not read it so. I read it thus: that if a man does it with a view of being indebted at a future time, that is, with a view to a state of things in which he may become indebted, that makes it fraudulent, just as if he were indebted at the time. In the present case Mr. *Douglas* made the settlement, as I am perfectly satisfied, with the view that he was going into partnership in which he might become bankrupt or insolvent and utterly ruined; and therefore he did it with the view that he might be indebted, and the settlement in my opinion was fraudulent and void against creditors. The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations.

[His Honour then referred to some of the correspondence as shewing that it was treated in January, 1864, as almost a settled thing that he was to go into the business, and continued:—]

I therefore hold that the settlement of the 24th of February, 1864, was absolutely null and void against the creditors within the meaning of the Statute of *Elizabeth*, and consequently that when Mr. *Douglas* executed the deed by which he vested all his property either at law or in equity in the inspectors or trustees, this property vested in them as being his, just as much as if the settlement of the 24th of February had never been executed.

That therefore brings me to the next point which was so much relied upon, namely, the effect of the release of the 22nd of February, 1866. It is said that because Mr. *Douglas*, in common with other partners, gave up some of the surplus assets of the Indian firm to pay the deficiency of the *London* and *Liverpool* firm, and in consideration of his doing so a release was executed, that had the effect of depriving these Plaintiffs of their right to sue in this suit. I am of opinion that it has no such operation. First of all,

for the reasons I have stated, I am of opinion that the effect of the deed is that the trustees on behalf of the creditors say, "You have given up all you have to give. We are satisfied you have stripped yourself of everything, and in consideration of your doing so we release you." Now, if Mr. *Douglas*, instead of giving up his property, had concealed it, I am of opinion that he could not take the benefit of that release, which was procured by his concealment of the facts. Upon that ground alone I should have come to the conclusion that the release for this purpose was inoperative, but upon the other ground, I say that the property was at that time vested in him, and they did not intend to give anything up. They took all the property of which this is part, and therefore the release has not the operation contended for by Mr. *Bristowe* and Mr. *Fischer*.

The result is that there must be a decree setting aside the settlement, and I am sorry to say that I see no ground whatever upon which I can relieve either Mr. *Douglas* or his trustees from the costs. It is very unusual for trustees to come forward as these have done actively to support such a settlement. They have thought fit to do so. In the case of *Crossley* v. *Elworthy* (1) the remarkable thing was that the wife of Mr. *Elworthy* would not appear to defend that settlement. Mr. *Elworthy* himself, I think, did not appear to defend it, but the guardians of the infants appeared to support it, and I therefore made them pay the costs of the suit. So in this case, as the trustees have come forward to uphold the settlement, they with Mr. *Douglas* are liable to the whole costs. The decree will be to set aside the settlement, with costs against all the Defendants.

Solicitors: Messrs. *Hillyer, Fenwick, & Stibbard*; Messrs. *Tamplin & Tayler*.

(1) Law Rep. 12 Eq. 158.

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1872

May 22, 23.

TORRANCE *v.* BOLTON.

[1870 T. 68.]

Vendor and Purchaser—Particulars—Description of Property—Conditions of Sale—Costs—Lien for the Deposit on Property sold.

Where property is sold by auction it is the office of the particulars to give an accurate description of the property, and of the conditions to state the terms on which the sale is made.

Therefore, where certain property was put up for sale, and in the particulars, which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady then in her seventieth year; and by the conditions of sale, which were read for the first time at the auction, just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, on bill filed by the purchaser at the auction, who stated that he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:—

Held, that although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a decree for the rescission of the contract and for a return of the deposit with interest, and a declaration of lien:

Held, also, that though in an ordinary case, inasmuch as the Plaintiff's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale.

The Court looks with disfavour on the practice of not producing the conditions of sale till the actual time of the auction.

Affirmed by L.J. 2 Ch 118.

THIS was a suit to obtain the rescission of a contract entered into by the Plaintiff for the purchase of a reversionary interest in certain freehold property in the county of *Warwick*.

The Defendant, being the owner of the property forming the subject-matter of the suit, caused an advertisement to be inserted in the *Rugby Advertiser* of the 8th of January, 1870, which was as follows:—

"*Clifton-on-Dunsmore,*
Warwickshire.
Preliminary announcement.
Mr. *William Cropper*
Will offer for sale by auction,
On an early day,
The absolute reversion to

"All that valuable freehold estate, situate as above, and con-

taining 73A. 2R. 19P., or thereabouts, now in the occupation of Mr. *W. Bull.*

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars apply to Mr. *Edmund Harris*, solicitor to the auctioneer, *Rugby*."

Subsequently a further advertisement was issued, by or on behalf of the Defendant, which was as follows:—

"*Clifton-on-Dunsmore, Warwickshire.*

Valuable freehold estate.

Mr. *Wm. Cropper*

"Begs to announce that he is instructed to offer for sale by auction (unless the same is previously disposed of by private contract, of which due notice will be given,) on Tuesday, the 8th day of February, 1870, at the *Lawrence Sheriffs Arms Hotel, Rugby*, at 4 o'clock in the afternoon, and subject to the conditions of sale to be there read.

"All that the immediate reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate and being at *Clifton-on-Dunsmore* aforesaid, as the same is now in the occupation of Mr. *Wm. Bull*, as tenant from year to year.

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars, and to treat for the purchase, apply to Mr. *Edmund Harris*, solicitor, *Rugby*.

"Dated the 14th day of January, 1870."

The Plaintiff was a surgeon practising at *Rugby*, and having seen the advertisements, made some further inquiries as to the nature of the property of a Mr. *Hefford*, who was a confidential clerk of Mr. *Harris*, the solicitor mentioned in the particulars, and whom the Plaintiff at that time met on different occasions. There was some question raised as to the exact amount of information given by Mr. *Hefford* to the Plaintiff; but it appeared that he had on one occasion mentioned that there was a reserved price of £3000. On the part of the Defendant it was attempted to be shewn that Mr. *Hefford* was in fact the agent of the Plaintiff, and

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that the Plaintiff must be considered to be affected with any knowledge which Mr. *Hefford* had gained from a Mr. *Henderson*, who was another clerk of the Defendant's solicitor, and it appeared was conducting the sale. The case of the Plaintiff, however, was that Mr. *Hefford* had given him no information from which he could suppose that the property was in any respect other than as described in the particulars.

The auction took place as mentioned in the advertisements, and before the opening of the biddings by the auctioneer, Mr. *Henderson*, who was present on behalf of the vendor at the sale, read through certain particulars and conditions of sale from a manuscript. No copy of the document read was handed to the intending purchasers.

The document so read, was as follows:—

"Particulars and conditions of sale of the absolute reversion of and in a valuable freehold estate at *Clifton-on-Dunsmore*, in the county of *Warwick*, to be offered for sale by auction at the *Lawrence Sheriff's Arms Inn, Rugby*, on Tuesday, the 8th day of February, 1870.

"Particulars.

"All that the immediate absolute reversion in fee simple of and in all that valuable farm and lands, containing 75A. 2R. 19P., with suitable farm-house and buildings thereon, situate and being at *Clifton-on-Dunsmore* aforesaid, as the same is now in the occupation of Mr. *William Bull* as tenant from year to year, falling into possession on the death of a lady now in her 70th year."

The conditions of sale followed. By the first of them the vendor reserved the right, by himself or his agent, to bid once for the property. The third condition was of the usual description as to delivering the abstract and making requisitions on the title.

The 4th condition was as follows:—

"The estate, the absolute reversion to which is the subject of the present sale, is subject to two several mortgages created by the vendor's predecessors in title: one for securing the principal sum of £1500 and interest at the rate of £4 15*s.* per centum per annum, and the other for securing the principal sum of £499 and

interest at the rate of £4 10s. per cent.; and the vendor has, by an indenture bearing date the 13th day of July, 1869, charged his reversionary estate with the sum of £500 and interest at £5 per cent. per annum. The purchaser shall take a conveyance subject to the said three several mortgages, and shall pay interest to the mortgagee on the said principal sum of £500 from the said 25th day of March next, all interest on the said sum up to that day being paid by the vendor. The interest on the said respective sums of £1500 and £499 is paid by the person entitled to the rents and profits of the said estate for life. The sale is also made subject to any claim for succession or other duty which may arise on the death of the tenant for life."

The 9th condition gave the vendor the option of reselling and charging the purchaser with any deficiency in case of his failure to comply with any of the conditions.

The Plaintiff was seventy-three years of age and very deaf, and he stated that he did not hear distinctly or pay much attention to what was read, and did not understand that by the 4th condition the property was sold subject to the incumbrances therein mentioned.

The sale was then commenced by the Plaintiff making a bid of £2000. A few other bids were made, but the sale was very inactive. Ultimately the property was knocked down to the Plaintiff for £2500. He then signed a memorandum attached to a copy of the particulars and conditions of sale, acknowledging that he had purchased by public auction the reversionary estate mentioned in the particulars, and that he had paid the agent of the vendor £250 as a deposit; and he agreed to pay the balance of the purchase-money and complete the purchase in all other respects agreeably to the conditions of sale. He signed this memorandum without reading the particulars or conditions attached.

The deposit was, in fact, not paid till the next day. The Plaintiff then sent his solicitor, whom he had not previously consulted in the matter, to the office of the Defendant's solicitor, giving him a cheque for £250, and requesting him to see to the completion of the purchase. The Plaintiff's solicitor, on attending in accordance with these instructions, was shewn a copy of the particulars

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and conditions, and he at once stated, on reading the 4th condition, that he believed the Plaintiff did not know he was buying subject to the incumbrances. On the 10th of February, 1870, the Defendant's solicitor sent the Plaintiff's solicitor a copy of the particulars and conditions of sale, and the Plaintiff stated that he then for the first time became aware of the effect of the 4th condition. On the 22nd of February, 1870, an abstract of the vendor's title was sent to the Plaintiff, on which was stated, both on the back and inside, the fact of the reading of the conditions at the sale.

On the 26th of February, 1870, the Plaintiff's solicitor wrote to the Defendant's solicitor on behalf of the Plaintiff as follows:—

"Dear Sir,—Having had a long interview with Dr. *Torrance*, who is anxious to be released from this contract in consequence of the misapprehension he was under, both previous to and at the sale, as to any incumbrances being on the property which the purchaser would be liable to pay.

"Previous to the sale Dr. *Torrance* had read only the particulars of sale, which describe the property sold as an absolute reversion, whereas it turns out that it is only an equity of redemption of and in such reversion.

"That Dr. *Torrance* had not read the conditions of sale, and being very deaf he did not hear them read at the sale, and knew nothing of the mortgages mentioned in the fourth condition, but (being misled by the description of the property in the particulars of sale) he supposed he was purchasing the absolute reversion therein mentioned, and bid accordingly for it, and not for a mere equity of redemption subject to mortgages which would double his purchase-money. He was also induced to bid up to the amount he did in consequence of a conversation he had had with Mr. *Hefford* previous to the sale, when he informed Dr. *Torrance* that your reserve was three thousand pounds. Under these circumstances Dr. *Torrance* is desirous to have the contract rescinded and his deposit returned, and is willing in such case to pay all the expenses of and incident to the sale."

The Plaintiff's solicitor received an answer to this letter from Defendant's solicitor, dated the 28th February, 1870, in which he

deprecated the proposal, but promised to refer the matter to the Defendant; and on the 2nd of March, 1870, he wrote again, positively declining to rescind. On the 4th of March following the Plaintiff sent in his requisitions on title, making them expressly without prejudice to his right to rescind; and, on the 17th of March, 1870, his solicitor gave formal notice of rescinding the contract, and threatened proceedings for the return of the deposit. The Defendant's solicitor then gave a notice requiring the Plaintiff to complete the purchase, threatening that unless this was done he would forfeit the deposit and rescind the contract, and would proceed under the 9th condition. The Plaintiff's solicitor, in answer to him, repeated the offer made on the 26th of February; and on the 11th of May, 1870, the Defendant's solicitor wrote to the effect that the deposit was forfeited, and that the property would be resold and the Plaintiff treated as liable for any loss.

The Defendant then advertised the property for resale on the 31st of May, 1870, and the bill was filed on the 30th of May, 1870. The prayer was that the contract might be declared to be rescinded and any action by the Defendant restrained, and that the deposit might be returned, and a lien be declared for it upon the property.

A further point set up on behalf of the Plaintiff was, that the sale was invalid on account of sham biddings, supposed to have been made by agents of the Defendant. It was, in fact, alleged, that the amount bid by the Plaintiff, together with the mortgage debt, exceeded the value of the property, and that no one who understood the effect of the 4th condition would make any addition to the Plaintiff's first bid. Part of the case set up by the answer was, that it was impossible under the circumstances that the Plaintiff could have misunderstood what took place at the auction, or failed to hear the reading of the conditions.

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the Plaintiff:—

The law is now well settled, that it is the duty of a vendor to ascertain the correctness of the description of property put up for sale by him, and on a sale the description in the particulars is part of the contract, and the vendor cannot throw upon the purchaser the obligation of ascertaining its correctness or discovering mistakes in it. This rule holds good even in the case of sales under

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the Court: *Martin* v. *Cotter* (1); *Lachlan* v. *Reynolds* (2); *White* v. *Cuddon* (3).

[The VICE-CHANCELLOR:—The proper office of the particulars is to describe the subject-matter of the contract, that of the conditions to state the terms on which it is sold.]

The Court has frequently objected to catching conditions of sale, but the case is much worse where the particulars are calculated to mislead. The rule that a party is bound by a description he chooses to make of property was acted on by Lord *Thurlow* in *Calverly* v. *Williams* (4), and by Lord *St. Leonards* in *Mortimer* v. *Shortall* (5). The equity here is to rescind the contract. Rectification can only be decreed where the mistake is mutual: *Harris* v. *Pepperell* (6). If the contract is rescinded the Plaintiff is entitled to a lien on the property for the deposit, as well as to a decree for its return: *Rose* v. *Watson* (7).

[They cited *Gilliat* v. *Gilliat* (8) on the question of the alleged irregularity in the biddings.]

Mr. *Pearson*, Q.C., and Mr. *Nugent*, for the Defendant:—

This is a suit asking to have the contract rescinded and the deposit returned. It is a very different case from any of those cited, which were in general suits for specific performance. And it may well be that the Court would not, under the circumstances, decree specific performance of the contract at the suit of the vendor, and yet not be willing to decree a rescission, the contract having been signed, and there being part performance by payment of the deposit, after the Plaintiff's solicitor who made the payment was aware of the nature of the conditions. If the Court does not decree a rescission, which is the principal part of the relief prayed, it will not order the return of the deposit, which is merely collateral: *Kendall* v. *Beckett* (9), but will leave the Plaintiff to any remedy he may have at law. Here the relief principally prayed

(1) 3 J. & Lat. 496.
(2) Kay, 52.
(3) 8 Cl. & F. 766; also 4 Y. & C. Ex. 25, under the name of *Cudden* v. *Cartwright*.
(4) 1 Ves. 210.
(5) 2 Dr. & W. 363.
(6) Law Rep. 5 Eq. 1.
(7) 10 H. L. C. 672.
(8) Law Rep. 9 Eq. 60.
(9) 2 Russ. & My. 88.

must be refused. The only equitable ground for relieving a party from a contract is actual fraud, or a mistake brought about in such a way as amounts almost to fraud, and that kind of case is not attempted to be set up. In *Twining* v. *Morrice* (1) the Court dismissed a bill for specific performance, and at the same time dismissed a cross bill for a rescission of the contract, and did so because the alleged fraud was not made out.

[The VICE-CHANCELLOR:—Lord *Cairns*, in *Aberaman Iron Works* v. *Wickens* (2), directed the rescission of a contract where there was no question of fraud.]

There must at least be mistake, or misdescription, or concealment maintained at the sale, so that the parties had no chance of discovering the real facts. Such are the cases of *Morshead* v. *Frederick*, referred to by Lord *St. Leonards*, Vendors and Purchasers (3); and *Coote* v. *Coote* (4). In *Stanton* v. *Tattersall* (5) a rescission was allowed on the ground of the misdescription, which could not have been discovered by the purchaser, and not on account of the more patent defect. It is morally impossible that the Plaintiff could have failed to understand the facts before bidding.

SIR R. MALINS, V.C., after referring to the facts, continued:—

The vendors, from the beginning, intended to put up the property under conditions which threw upon the purchaser the obligation of paying off the mortgages to which it was subject, or in other words, they put up for sale, not the property free from incumbrances, but the equity of redemption in it; and the Plaintiff swears that he went to the sale intending to bid, and did bid, in the belief that he was to purchase property for the enjoyment of which he would only have to pay the purchase-money, and would then, after the expiration of the life estate of the tenant for life, who was then in her seventieth year, have it absolutely free from all incumbrances. Now a mistake on both sides is undoubtedly a ground for relieving a party from a contract into which he has entered.

Mr. *Pearson* was very anxious to impress upon me that the Court never entertains a suit for the rescission of a contract unless

(1) 2 Bro. C. C. 326.
(2) Law Rep. 4 Ch. 101; Ibid. 5 Eq. 485.
(3) 14th Ed. p. 120.
(4) 2 Ir. Eq. Rep. 159.
(5) 1 Sm. & Giff. 529.

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it has been obtained by fraud. I expressed my strong impression, derived from many years' experience in cases of vendor and purchaser, that mistake, where it is satisfactorily established, as where a purchaser has been led by the conduct of the vendor to believe that he has been purchasing one thing when in fact he has been purchasing another, is just as good a ground for rescuing persons from a contract as fraud. A remarkable instance of this is *Stanton* v. *Tattersall* (1), which was a decision of Vice-Chancellor *Stuart*, never appealed from, but always acquiesced in, and accepted as a binding authority by Lord *St. Leonards*. [His Honour then referred to the facts of that case and continued:—]

That was a case of misdescription, not treated as fraudulent, because the purchaser by a common act of prudence might have found out what he was buying. Nevertheless he was held to be entitled to rely on the description of the property and to relief according to the frame of the suit, as to which, I am bound to admit, there is a great deal of difficulty; inasmuch as it was not a bill for specific performance, but one by a purchaser to be relieved from his contract, that is, a bill to rescind a contract. He was, however, relieved both on the ground of misrepresentation and on the ground that the house, being approached by a wooden passage, did not come within the description of that which he had bought.

But this case raises a point of very general importance, as to the practice, which I am told, prevails in almost all parts of *England*, of advertising the property to be sold under conditions of sale to be produced at the auction. They are not annexed to the particulars, but are read and listened to in the confusion and hubbub of the auction-room, by persons of different degrees of understanding, who are in those circumstances intended to be bound by conditions of the most onerous description put forward by persons who have had the fullest opportunities of printing and annexing them to the particulars, but have failed to do so. However, I do not believe the practice to be general. In no case which has been brought before me since I have sat here has such a practice been adopted, and during the last twenty years of my practice at the Bar I do not remember more than one such case, and that was from the remote parts of the West of *England*, where I believe

(1) 1 Sm. & Giff. 529.

such a practice did formerly prevail, but has now ceased. But if the practice does prevail the profession cannot too distinctly understand that it is one to be reprobated in the strongest manner. It is detrimental to the interest of their clients, it is calculated to mislead, and it has, in my opinion, the most prejudicial effect on the interests of all concerned.

Take the present case; what would have been more simple than for these parties, who, I believe, intended to act properly, to describe what they were selling in accurate terms? When a man describes property he is selling as being seventy-five acres of land, that means that he is selling the fee simple. Here the description was so far accurate as to state that what was sold was the fee simple, not in possession, but subject to the life estate of a lady in her seventieth year; and if it had gone on to say that it was sold subject to mortgages for £2500, it would have been perfectly accurate; but the vendor has preferred stating this by way of a condition. Then he was bound to let everybody who was likely to bid for this property know exactly what he would have when he bought, and under what conditions he was buying. That was not done.

[His Honour then referred to the evidence as to what took place at the auction, and concluded that the Plaintiff did not understand the effect of the conditions. He then continued:—]

Now, if the Defendant, choosing to adopt the practice—which, in my opinion, is most prejudicial—of having the conditions read for the first time in the auction room, had only taken the precaution to have them printed and handed to all the gentlemen in the room, and the auctioneer had requested them to follow him whilst he read them, and it had been proved that the Plaintiff had had them in his hands, this controversy could not have arisen.

But I go further than this, and I say that the introduction of such a term as this is not the proper office of a condition of sale; and if it be introduced as a condition, it is at all events necessary that such a condition should be in the possession of the person who is attracted by the particulars; and the Defendant has shewn his sense of the propriety of this view by annexing the conditions, to the particulars, for the purpose of putting the property up for sale a second time. But I am clearly of opinion that this was not

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the proper office of a condition of sale. Where property is intended to be sold free from incumbrances it is not necessary to say anything about them, because if there are any they will be paid off out of the purchase money. But where the purchaser is to take upon himself the obligation of paying them off what is sold is in fact an equity of redemption; and the vendor in such a case is, in my opinion, bound to state in the particulars that which will shew to a purchaser that he is buying property subject to a mortgage, and is only to have the value of it after satisfying the mortgage. Here nothing could have been more simple than to have explained the facts on the particulars, and enabled parties to make their calculations as to what was to be considered the value of the incumbrances previously, instead of in the hurry and bustle of the auction-room; and I think that the Defendant has wholly failed in his duty in not stating, in the particulars, that what was sold was merely an equity of redemption.

That being my opinion, I think that the Defendant is not protected at all by the condition, though he would have been protected if it could have been distinctly brought home to the Plaintiff that he knew the property was subject to the mortgage, and that he was to pay it off. Accordingly the Defendant has attempted to shew this.

[His Honour then discussed the evidence on this point and expressed himself satisfied that the Plaintiff never intended to give £2,000 for the equity of redemption, and that the Defendant never intended to sell the fee simple for that sum. He then continued:—]

It is therefore, in my opinion, a case of common mistake. The clear doctrine of the Court is, that where contracts are entered into by mistake they must be rescinded. That is shewn by the passage in Lord *St. Leonards* on Vendors and Purchasers (1) where *Stanton* v. *Tattersall* (2) is referred to, and the rule is laid down that mistake is a ground for rescinding a contract in this Court, just as much as fraud. And the mistake being one into which the Plaintiff has been led by the grossly negligent and im-

(1) 14th Ed. p. 120. 13 Ed 95. (2) 1 Sm & Giff. 529. 17 Jan 96?

proper mode in which the Defendant has conducted the sale, though I am satisfied there was no intention to mislead, the consequence is that the contract must be rescinded.

[His Honour then commented on the correspondence, and stated that he was of opinion that the Defendant ought to have accepted the offer contained in the letter of the 26th of February, 1870. He then considered the evidence as to value, and concluded that the property was not worth the £2,500 in addition to the amount of the mortgage debt. He then continued:—]

On the whole, therefore, I come to the conclusion that it was the duty of the Defendant, in the description of the property itself, and not merely by conditions of sale, to describe that it was an equity of redemption which he was selling. I think it was an improper thing to introduce the fact of the property being mortgaged by way of condition at all; but if the vendor did it in that way it was incumbent upon him to annex the conditions to the particulars. It has not been attempted to be denied that the Defendant must have failed if he had been Plaintiff in a suit for specific performance, and considering that the Plaintiff was led to give more than the value of the property, I think it is my duty to give him the decree which he asks.

Then comes the question as to costs. If it had not been for the correspondence I should have held that the carelessness of the Plaintiff in not attending to the reading of the conditions of sale and want of due caution in not making inquiry would have been a ground for giving him the relief to which he is entitled without costs. But considering the offer which was made by the Plaintiff, the refusal to accept which led to the litigation, I must consider the Defendant as the cause of the suit, and give relief with costs.

With regard to the return of the deposit I understand it to be clearly established now as the rule of the Court that where a contract has been rescinded on the ground of fraud, surprise, misrepresentation, or anything of the kind, and where a deposit has been made, it is within the jurisdiction of this Court in the decree that is made also to order the deposit to be returned. Therefore it will be part of my decree that the deposit also shall be returned. I do not know whether you ask for interest, Mr. *Cole?*

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Mr. *Cole*:—It was given in *Webb* v. *Kirby* (1), where the deposit was returned.

A short discussion ensued in which the form of the decree in *Aberaman Iron Works* v. *Wickens* (2) was referred to, and the Vice-Chancellor ultimately directed a decree to be made that the contract should be rescinded and given up to be cancelled, and for a return of the deposit with interest, and a declaration that there was a lien for it on the property.

Solicitors: Messrs. *Cole, Cole, & Jackson;* Messrs. *Iliffe, Russell, & Iliffe.*

V.-C. M. 1872 May 24.

In re JEFFERYS' TRUSTS.

Appointment—Limited Power succeeded by General Power—Implied Gift—Conditional Exercise of Power—"Nearest of Kin" of a Married Woman.

A testator gave his residuary estate to trustees upon trust for his daughter for life, and after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, and in default of appointment as she should by deed or will generally appoint, and in default of appointment under that power to her nearest of kin, according to the Statutes of Distribution.

The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—

Held, first, that there was an implied gift to the objects of the first power in default of appointment; secondly, that if not, the appointment was conditional on there being no children, and they took as nearest of kin as in default of appointment.

PETITION.

John Jefferys, by his will, dated the 30th of March, 1843, gave his residuary personal estate to trustees upon trust, after a life interest in favour of his wife, to pay the income to his daughter *Emma Jefferys* upon her attaining the age of twenty-one years or being married, which should first happen, for her separate use without power of anticipation; and after her decease, then, as to the capital and future income of the said trust premises, in trust for all

(1) 7 D. M. & G. 376. (2) Law Rep. 4 Ch. 101; Ibid. 5 Eq. 485.

or any one or more of the children, grandchildren, or other issue of his said daughter, such children, grandchildren, or other issue to be born in her lifetime, for such interest or interests, and in such portions and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, and other issue, and with such regulations for maintenance, education, and advancement, to be paid or transferred at such age or ages either absolutely or upon such contingencies as his said daughter, whether covert or sole, should at any time, or from time to time, by any deed or deeds, or by her last will and testament, or any codicil or codicils thereto to be respectively legally executed by her, direct or appoint or give or bequeath the same; and in default of such direction and appointment, and subject to any appointment which should not be a complete disposition of the said trust premises, then upon trust for such person or persons in such parts, shares, and proportions, and to and for such intents and purposes, and in such manner and form in all respects as his said daughter should at any time, whether covert or sole, by any deed or deeds, or by her last will and testament, or any codicil or codicils thereto to be respectively legally executed by her, direct or appoint or give or bequeath the same; and in default of such direction or appointment, gift or bequest, and subject to any appointment which should not be a complete disposition of the trust premises, in trust for the person or persons who should be her nearest of kin under or by virtue of the statutes for the distribution of intestates' estates.

The testator's daughter, *Emma R. Jefferys*, married the Petitioner, *Evelyn Wigton Saunders*, and by her will, dated the 14th of April, 1847, after reciting the will of her father and the death of her mother, and reciting, as the fact then was, that she had no children of her marriage, and that she was desirous to execute the power of appointment and disposition of the testator's trust property in manner thereinafter mentioned, proceeded as follows: "Now I, the said *Emma Saunders*, in exercise and execution of the power and authority given and reserved to me by the said hereinbefore in part recited will, and of all other powers or authorities in anywise enabling me in that behalf, do, by this my last will and testament legally executed, direct and appoint, give and

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bequeath all and singular the trust funds, estate, and premises forming the clear residuary estate and effects of the said *John Jefferys*, deceased, and now vested in the said *William Jefferys* and *Thomas Simson Jefferys*, as such surviving trustees of the said will as aforesaid, and the stocks, funds, and securities wherein the same may be invested, unto and for the sole use and benefit of my said husband, *Evelyn Wigton Saunders*, his executors, administrators, and assigns; and I hereby direct and declare that the said *William Jefferys* and *Thomas Simson Jefferys*, as such surviving trustees of the will of the said *John Jefferys* as aforesaid, shall stand possessed of and interested in the said trust premises to and for the use and benefit of my said husband, *Evelyn Wigton Saunders*, his executors, administrators, and assigns, and to and for no other use, trust, and intent whatsoever."

Emma Saunders died on the 7th of March, 1872, leaving several children of the marriage between her and the Petitioner, without having revoked the appointment of the 14th of April, 1847, and without having exercised the limited power of appointment amongst her children and grandchildren; and the appointment was admitted to probate. Two of the children of the marriage had attained twenty-one, and one, a daughter, had married under that age.

The trustees transferred into Court the fund representing the testator's residuary estate, consisting of £1325 Consols, and the husband now petitioned for payment of it to himself.

Mr. *Miller*, Q.C., and Mr. *Brett*, for the Petitioner:—

The rule is, that where there is a gift over after a limited power of appointment there is no implied gift to the objects of the power in default of appointment; and here the testator's daughter was at liberty to exercise the general power without reference to the existence of children: *Pattison* v. *Pattison* (1); *Roddy* v. *Fitzgerald* (2); *In re White's Trusts* (3). The cases where such a gift has been held to be implied are such as *Harding* v. *Glyn* (4) and *Brown* v. *Higgs* (5), where the power is so expressed as to throw

(1) 19 Beav. 638.
(2) 6 H. L. C. 823.
(3) Joh. 656.
(4) ~~5 Ves. 501.~~ 14 Ves 469, 470
(5) 4 Ves. 708; 8 Ves. 561, 569.

the duty of exercising it upon the donee, but where there is a gift over no such inference can arise: Lord *St. Leonards* on Powers (1).

The appointment under the power is not conditional on the non-existence of children. In fact, a conditional testamentary exercise of a power would not be admitted to probate if the condition did not subsist. If the exercise of the power is not good the husband is entitled as administrator, for where there is a reference to the Statutes of Distribution the person entitled to administration takes under the designation of nearest of kin.

Mr. *Glasse*, Q.C., and Mr. *Wintle*, for the children, were not called upon.

Mr. *Waller* appeared for the trustees.

SIR R. MALINS, V.C.:—

Taking the whole case together, I cannot doubt what is the conclusion at which I ought to arrive. [His Honour then read the limited power of appointment, and continued:—] If the will had stopped there no child could have taken anything under the express words unless under an appointment. The effect, however, of such a clause was discussed in *Doe* v. *Goldsmith* (2), and I am of opinion that in such a case the children would take equal shares by implication, although there were no exercise of the power. The testator, however, continues: "And in default of such direction and appointment," which, I think, means "in default of children, and there being, consequently, no objects of the previous power." For if the testator had intended the general power to operate where there were children in existence, I think he would have put it before the limited power.

Then what has the daughter done? By will in 1847 she exercises the second power. But she recites that she had no children at the time of exercising it, and I think her meaning is, that she was well aware that she could not appoint, and did not intend to appoint, to her husband except in default of children. I am therefore of opinion that the appointment cannot take effect, because she expresses in her will the fact of having no children as the motive of the appointment.

(1) 8th Ed. p. 589. (2) 7 Taunt. 208.

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But then it is said that she let twenty-two years pass without making any alteration in the appointment. I think, however, that that circumstance might have arisen from her having forgotten it, or having thought that it only operated in case of having no children.

Then supposing the appointment did not take effect on account of the non-existence of the state of things contemplated by it, the property would go as if there had been no appointment. The testator directs that it shall go to his daughter's nearest of kin according to the Statutes of Distribution. It has been decided that such an expression cannot include either husband or wife. It must therefore mean the children.

Therefore, if I am right in my first view, the children take under the implied gift in the will; if not, they take as nearest of kin. There will accordingly be a declaration to that effect, and the part of the fund representing the shares of the infants must be retained in Court, and, if necessary, an application can be made in Chambers for an allowance out of it for maintenance.

Solicitors: Messrs. *Fairfoot & Webb;* Messrs. *Scard & Son.*

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[1869 H. 43.]

V.-C. B.

1872

March 15, 16.

Will—Annuities—Whether for Life or Perpetual.

Testator devised and bequeathed all his property "of every description," to trustees "for the following uses, intents, and purposes, viz.," he left "the sum of £56 per annum to be paid quarterly to his wife," *H. R.* He gave to *A. L.* "the sum of £50 during her life." He left £800 per annum out of the proceeds of an East Indian estate, to be appropriated by his trustees to the maintenance and education of the eight children of his daughter, *I. H.*, wife of Captain *H.*, provided the children should take his name, "under forfeiture of" the £800 per annum, should they decline to do so. If there should be an increased profit to £800 per annum, testator bequeathed the same as therein mentioned. If any of the children should die, their mother should have "the benefit of the deceased child or children's share or shares." The trustees should have the power, should any one of the children get into debt, to forfeit his share, and divide it with the other children. The trustees should have power to sell the East Indian estate, should the profits of the working not be sufficient to pay the annuities to the children; the proceeds of the sale to be invested in certain bonds, "in the names of the said trustees for the benefit of" the children. Should the profits not reach £800 annually from the working or sale of the estate, then the trustees should "charge the residue of" the testator's property to make up the said annual sum of £800. Should the sale realise more than enough, when invested, to pay the sums, the extra proceeds should be invested in the aforesaid bonds for the benefit of *I. H.*, but the sum to be paid to her from the said investment should not exceed £500 annually:—

Held, that the annuity to the testator's widow was for life only; but that the annuities to the children of *I. H.* were perpetual.

FURTHER CONSIDERATION.

Thomas Ross, who died on the 30th of August, 1868, made a will, dated the 25th of August preceding, in the following terms:

"I, *Thomas Ross*, of *Kilravock House, South Norwood Hill, Surrey*, do hereby give, devise, and bequeath, to my trustees now named, viz., *Christian Jacob Ross*, of *Kilravock House, South Norwood Hill, Surrey; James Theobald*, of 16, *Furnival's Inn; Alexander Neish*, of 150, *Leadenhall Street*, secretary to the *Borokai Tea Company, Limited*, all my property of every description, whether freehold, leasehold, or any other description whatever, for the following uses, and intents, and purposes: viz., I leave the sum

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of £56 per annum, to be paid quarterly, to my wife *Harriet Ross*. I leave and bequeath to *Ann Lloyd*, late of *Kilravock House*, the sum of £50 per annum during her life, in addition to the sum of £70 per annum already settled upon her by bond or deed during her life. . . . To my three dogs I bequeath the sum of £20 per annum during their lives, the said sum to be reduced as they drop off. And I also bequeath the sum of £30 each per annum to each of my trustees during their trusteeship, but if any question should arise as to any undue influence my brother *Christian Jacob Ross* has or may have exercised, then I appoint *Thomas Southcott*, of 9, *Hale Street, Islington*, to be trustee in his place. I also leave the sum of £800 per annum, out of the proceeds of the profit of the working of my East Indian estate, to be appropriated by my trustees to the maintenance and education of the eight children now alive of Mrs. *Isabella Hicks*, wife of Captain *Hicks*, of the *Scots Greys*, stationed at *Dundalk*, provided the said children shall exchange the name of *Hicks* for that of *Ross*, under forfeiture of the said £800 per annum should they decline to do so. If there shall be an increased profit to £800 per annum, one half part of such increased profit shall be given to my daughter *Isabella Hicks*, and the other half to my said brother *Christian Jacob Ross*, and the said sums of £800 and the increased profit shall be paid to my said daughter *Isabella Hicks*, to her receipt only, and free from the control of any other person or persons whatever. If any of the said children shall die, their mother shall have the benefit of the deceased child or children's share or shares. The trustees shall have the power, should any one of the said children get into debt, to forfeit their share or shares, and divide it with the other children. The trustees shall have the power to sell the said East Indian estate, should the profits of the working not be sufficient to pay the annuities to the children of Mrs. *Hicks*. The proceeds of the sale of the said estate shall be invested in *Victoria* Bonds or shares, in the names of the said trustees for the benefit of the said children. Should the profits not reach £800 annually from the working of the estate or the sale of the estate, then the trustees shall charge the residue of my property to make up the said annual sum of £800. Should the sale of the estate realise more than enough, when invested, to pay the said annuities, then the

extra proceeds shall be invested in the aforesaid bonds for the benefit of Mrs. *Isabella Hicks;* but the sum to be paid her from the said investment shall not exceed £500 annually, which is to continue for her sole use and benefit. For the working of the East Indian estate, I leave (in addition to the sums already forwarded to *India* for the working of the said estate) it to my trustees to set aside a sum of money which shall be used as a reserve fund, in case of blight, drought, or any similar cause; but such sum of money to be equal to only three months' working estate expenses; such sum of money not to be raised by mortgaging the property or the proceeds to be derived therefrom. The trustees shall be invested with power to invest the moneys for Mrs. *Hicks* and her children in *India* bonds or shares. I appoint my brother, *Christian Jacob Ross,* residuary legatee; but that the revenue from my various properties shall be appropriated to the payment of all debts due, and demands due at my death. I appoint as my executors *Christian Jacob Ross, James Theobald,* and *Alexander Neish.* Should the said *Alexander Neish* decline to become a trustee and executor, then I appoint *Thomas Southcott.* This is my last will and testament."

By a codicil, dated the same 25th of August, he empowered his trustees to let the estate for a term not exceeding three years; and by a second codicil, dated the 27th of August, he appointed *Thomas Southcott,* a fourth executor and trustee.

The estate was ample; but the East Indian estate (which had been sold and had realised about £3500) was insufficient to yield £800 a year.

The bill was filed by Mrs. *Hicks's* children, who were infants, against the executors and trustees, and (by revivor) against the representatives of *Christian Jacob Ross,* who had since died, for administration, and the only important question was, whether the annuities to the widow and to the children of Mrs. *Hicks* were for life only or perpetual.

Mr. *Amphlett,* Q.C., and Mr. *Bush,* for the Plaintiffs:—

An annuity to a person named will generally be an annuity for life only; but where the gift is a gift of such an amount of property as will be sufficient to produce an annuity the Court will infer an

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intention that it should be perpetual. Here the property given is the proceeds of the Indian estate. The proceeds are appropriated for the purpose.

Here there is also a gift over on the death of a child. Suppose a child should die; for how long is the mother to have the benefit of the deceased child's "share"? Unless the annuity is perpetual, the limitation over and the use of the word "share" are insensible.

The authorities are *Stokes* v. *Heron* (1); *Mansergh* v. *Campbell* (2); *Vaughan Hawkins* on Wills (3); *Bent* v. *Cullen* (4).

Where a life annuity only is intended, as (according to our view) in the case of the widow, the language is different and distinct.

Mr. *Eddis*, Q.C., and Mr. *Nalder*, for Mrs. *Hicks*:—

Upon the question of the annuities we support the Plaintiffs' contention.

During the minorities of the children, the £800, or a proportional part of it, is payable to Mrs. *Hicks*: *Crockett* v. *Crockett* (5); *Hammond* v. *Neame* (6).

Mr. *Swanston*, Q.C., and Mr. *Housley*, for the executors and trustees, and for the widow:—

The annuity to the widow is also perpetual, being charged on the testator's property "of every description," including his real estate: *Kerr* v. *Middlesex Hospital* (7); *Hill* v. *Rattey* (8).

The life annuity to *Ann Lloyd* and the provision for the dogs are clearly enough expressed.

Mr. *Kay*, Q.C., and Mr. *Terrell*, for the representatives of *Christian Jacob Ross*:—

The annuities are for life only. Both propositions—first, that a gift of an annuity beyond the life of the first taker is of itself a sufficient indication of the intention that it should be perpetual; and, secondly, that an appropriation of property to meet the

(1) 12 Cl. & F. 161.
(2) 3 De G. & J. 232.
(3) Page 128.
(4) Law Rep. 6 Ch. 235, 238.
(5) 2 Ph. 553, 558.
(6) 1 Sw. 35.
(7) 2 D. M. & G. 576.
(8) 2 J. & H. 634, 644.

annuity is a sufficient indication—are untenable: *Lett* v. *Randall* (1); *Yates* v. *Maddan* (2); *Blewitt* v. *Roberts* (3).

The principle of *Bent* v. *Cullen* (4) is that a gift of part of the income of a fund is a gift of so much of the fund as will produce that income. But a gift of so much a year, charged on a particular fund, is not a gift of the fund itself. The testator here has merely said that which the law would have said for him.

The gift of an annuity without words of limitation is a mere gift for life. The omission of words of limitation will not enlarge the gift.

The gift over on the death of a child is limited to the lifetime of the mother. The intention was that this provision for the children and their mother should go on during their joint lives; if a child should die, the mother was not to lose the benefit; but that after the mother's death the shares of children already dead or dying thereafter should fall into the residue. Why should not the word "share" apply to a share of income?

The indication of intention is at least as strong in favour of the residuary legatee as of these children.

SIR JAMES BACON, V.C.:—

The questions on which the decision of the Court is asked in this case are questions of construction, as to which it is the duty of the Court not to violate any established rule provided that the indications of intention are not so apparent as to control its application.

In this instance the intention of the testator is not very apparent, and his will, which was written by a layman, must be considered as a whole.

First, as to the annual sum directed to be paid to his wife, it has been said that, where he wishes to give a life annuity, as to the legatee *Ann Lloyd*, and in the provision made for his dogs, he uses language about which there can be no doubt. That is so; but the remark is not wholly conclusive, if the will be read as an entirety.

The testator begins by a devise and bequest to his executors and trustees of all his property of every description, "for the follow-

(1) 2 D. F. & J. 388.
(2) 3 Mac. & G. 532.
(3) 10 Sim. 491; Cr. & Ph. 274.
(4) Law Rep. 6 Ch. 235.

105 C 6 Jun 25. 1859

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ing uses, intents, and purposes." That bequest does not, in my opinion, alter the construction in any way. It is simply an expression of that which is the necessary consequence of almost every testamentary disposition which is not specific or demonstrative.

Then he gives to his wife "the sum of £56 per annum, to be paid quarterly," which I think is an annuity to the wife for her life only.

A greater difficulty arises on the gift to the children of Mrs. *Hicks*. The testator has clearly placed himself towards these children *in loco parentis*. He is providing for his grandchildren, and he desires that they shall take his name, which is a very significant fact. Having an estate in *India*, which he estimates will produce £800 a year, he directs his trustees to appropriate that sum to the maintenance and education of these children. [His Honour read the clause to the end of the provision as to the increased profit of the estate, and continued :—]

If the bequest had stopped there, the result might have been to shew an intention to benefit the children during their lives only. But the testator goes on to say :—

"If any of the said children shall die, their mother shall have the benefit of the deceased child or children's share or shares. The trustees shall have the power, should any one of the said children get into debt, to forfeit their share or shares and divide it with the other children." He then gives the trustees power to sell the estate, "should the profits of the working not be sufficient to pay the annuities to the children;" the proceeds of the sale to be invested in *Victoria* bonds "in the name of the trustees, for the benefit of the said children." Then the testator, who seems to have anticipated a great many events which have actually happened, says: "Should the profits not reach £800 annually from the working of the estate, or the sale of the estate, then the trustees shall charge the residue of my property to make up the said annual sum of £800." If the result of the sale should be less than enough, the trustees were at once to make up the difference; if the result should be more than enough, the extra proceeds, up to £500 a year, were to be invested for the benefit of Mrs. *Hicks*.

As to the general meaning of the testator, therefore, there can be no doubt. Having taken upon himself to provide for his eight

grandchildren, he has done so in terms which make his Indian estate liable to make up this £800 a year, and if that fails, then his whole estate is liable to make up the amount. It is an absolute gift, unlimited in time and in terms. The whole of the testator's estate is liable for so much money as will give to each child a fund capable of producing £100 a year. The estate is pointed out as the fund out of which this amount is to be satisfied. I cannot think, upon the whole of these clauses, that the testator meant less than an out-and-out gift. The gift of residue to the brother amounts to no more than this, that the testator desires that all which shall remain, after his wishes have been accomplished, shall go to his brother.

I am of opinion that, as to the wife, the annuity is for life only; but that as to the children of Mrs. *Hicks*, each of them is to take such an amount as will yield £100 a year.

As to the claim made on behalf of Mrs. *Hicks*, I think the point raised in *Crockett* v. *Crockett* (1) does not arise here. There the gift was for the benefit of the wife and children *pari passu*, and Lord *Cottenham* thought the money ought to be paid to her. Here the direction is that the £800 a year is to be "appropriated by" the trustees. The fund must therefore be applied by the trustees, and not paid to Mrs. *Hicks*.

Solicitors: Mr. *Theobald*; Messrs. *Fladgate, Clarke, Smith, & Forster*.

(1) 2 Ph. 553, 558.

V.-C. B.
1872
April 25.

In re TEIGNMOUTH AND GENERAL MUTUAL SHIPPING ASSOCIATION.

MARTIN'S CLAIM.

Winding-up—Marine Insurance—Unstamped Policy—Acknowledgment of Liability.

LR 10 Ch 547.

A. insured a ship in a mutual marine insurance association in 1863, and the policy, which was not stamped, was annually renewed up to the year ending March, 1868. In February, 1868, the ship, with *A.* on board, was lost at sea. The loss of the ship was reported to the association, and it appeared from entries in the minute books that the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to *A.* had been appointed.

The company was ordered to be wound up in January, 1870, and *A.*'s widow obtained letters of administration to him in December, 1871. Upon a claim by the widow under the winding-up for the amount secured by the policy:—

Held, that there was a sufficient admission of liability in the books of the company to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence.

Smith's Case (1) distinguished.

ADJOURNED summons on a claim by *Jane Martin*, administratrix of her late husband *Edwin Martin*, that she might be allowed to rank as a simple contract creditor against the assets of the *Teignmouth Shipping Association* for a sum of £150, being the balance due on a policy of marine insurance for £200 effected by *Edwin Martin*, after deducting the sum of £50 in respect of a lien thereon claimed by the *Torquay Brewing Company*, and already allowed by the Court.

Edwin Martin, in 1863, insured the ship *Arbitrator*, of which he was the registered owner for a sum of £200 in the association. According to the custom of the association the policy was renewed annually up to the year ending March 20, 1868. It was the practice of the association to issue unstamped policies in respect of insurances effected with them, unless special application was made by the insurer for a stamped policy, and it appeared that no such

(1) Law Rep. 4 Ch. 611.

special application was ever made by *Martin* in respect of his policy.

The ship *Arbitrator*, with *Martin* on board as mate, sailed from *Cardigan* in February, 1868, on a voyage to *Cardiff*, but since the time of sailing had never been heard of. Her total loss was reported to the association as having happened on the 16th of February, 1868. At the next quarterly meeting of the association the claim in respect of the loss of the ship was brought before the committee and allowed, and an entry to that effect was made in the minute book, and at that and subsequent meetings the whole sum of £200 was ordered to be drawn for. It was the practice that when a loss happened for which the association was liable, the amount ordered to be drawn for was apportioned amongst the various members liable to contribute to the loss, and the amount collected was paid over to the insurer.

The £200 due upon the policy was collected, but retained by the secretary until a personal representative to *Martin* had been appointed. A sum of £50, part thereof, was claimed by the *Torquay Brewing Company* under an order from Mrs. *Martin*, the widow, and would have been paid by the association but for the winding-up order made in January, 1870.

Mrs. *Martin*, not having been able to obtain letters of administration to her husband until December, 1871, now claimed to be entitled as a creditor against the association for the balance of the £200 secured by the policy.

Mr. *Ince*, in support of the claim :—

There is a sufficient admission by the entries in the minute books that the several sums drawn for, amounting to £200, were due upon the policy to *Martin* or his representatives, to enable Mrs. *Martin* to recover as upon an account stated, although the document on which the claim arises, not being stamped, cannot be put in evidence.

An admission of a sum being due and an undertaking to pay, even though the debt arises out of a written agreement which is not produced, is sufficient evidence at common law of an account stated, so as to entitle the creditor to recover upon a count on an account

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In re TEIGNMOUTH AND GENERAL MUTUAL SHIPPING ASSOCIATION. MARTIN'S CLAIM.

stated: *Cocking* v. *Ward* (1); *Newhall* v. *Holt* (2); *Barker* v. *Birt* (3).

Mr. *Marten*, for the official liquidator:—

The policy upon which the claim is founded is not stamped, and therefore, having regard to 35 Geo. 3, c. 63, there is no contract available either at law or in equity: *Smith's Case* (4). The case has been rested at the Bar upon an account stated, as evidence of which the entries in the minute books are referred to. But until administration was granted to Mrs. *Martin* in December, 1871, nearly two years after the winding-up of the association, there was no representative of *Edwin Martin*, no person with whom the account could be stated; and the acknowledgment must be made either to Plaintiff himself or to his agent, and is not sufficient if made to a stranger: *Breckon* v. *Smith* (5); *Bullen & Leake's* Precedents of Pleading (6).

SIR JAMES BACON, V.C., distinguished this case from *Smith's Case*, as the policy, which was for the year only, involved no corresponding liability on the part of the insurer to contribute to losses. The validity of the claim had in effect been admitted by the payment of the £50 to the *Torquay Brewing Company* and by the entries in the minute books. The relation of debtor and creditor had been established between the parties, and Mrs. *Martin* was entitled to recover the amount admitted in the books of the association to be due upon the policy, subject to a reference to inquire as to the claims and the amounts payable thereon.

Solicitors: Messrs. *Clarke, Woodcock, & Ryland;* Messrs. *James, Curtis, & James.*

(1) 1 C. B. 858.
(2) 6 M. & W. 662.
(3) 10 Ibid. 61.
(4) Law Rep. 4 Ch. 611.
(5) 1 A. & E. 488.
(6) Page 52.

TANQUERAY *v.* BOWLES.

V.-C. B.
1872
March 20, 21.

[1870 T. 56.]

Voluntary Settlement—Suit to set aside—Bankruptcy—Costs.

SCh 218

After bill filed on behalf of creditors to set aside as fraudulent and void a voluntary settlement by *A.*, their debtor, and a composition signed by the creditors in ignorance of such prior voluntary settlement, the debtor was adjudicated bankrupt, and an order was made by the Court of Bankruptcy setting aside the voluntary settlement. Plaintiffs, whose claim to prove under the bankruptcy had been admitted notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, and that Plaintiffs' costs should come out of the estate. The trustees declined this proposal, but offered to consent to an order staying all proceedings in the suit without costs, or dismissing the bill without costs:—

Held, that upon the bankruptcy of *A.* the trustee in bankruptcy should have applied to the Court to have stopped the suit, which, though rightly instituted in the first instance, could no longer be prosecuted with benefit to the creditors, and that Plaintiffs were entitled to the costs of suit up to the date of their letter to the trustees of the settlement, out of the estate realised in bankruptcy, and the trustee in bankruptcy to the costs only of realising the estate:

Held, also, that the trustees of the settlement, who, by their refusal of Plaintiffs' offer, had compelled them to bring the suit to a hearing, must pay all Plaintiffs' costs incurred since the date of that offer.

THIS was a creditors' suit to set aside a composition made by Defendant *Bowles* with his creditors in December, 1868, and a prior voluntary settlement executed by him in April, 1868.

Bowles was a publican, and in August, 1867, being then indebted to Messrs. *Whitbread*, the brewers, as first mortgagees of the public-house, in a sum of £500, with arrears of interest, executed a second charge to Plaintiffs, Messrs. *Tanqueray*, the distillers, for an existing debt and future advances to the extent of £350. He was also indebted to one *Davis* on a third mortgage, and to other unsecured creditors. In August, 1868, a sale or "change" of the public-house took place, in accordance with the custom of the trade, for payment of the creditors, and a net sum of £661 10*s.* was realised by the lease, fixtures, and licence, and £140 12*s.* by the furniture and stock in trade.

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Out of the £661 10*s.* Messrs. *Whitbread* retained the amount of their debt with interest and costs, and the balance was applied in reduction of Plaintiffs' debt, leaving £180 10*s.* still owing to them and a large amount due to the other creditors, for which the balance of £140 12*s.* from the sale of the furniture was alone available.

The Plaintiffs and the other creditors pressed for payment, and communications took place in the course of which (as the bill alleged) the solicitor of *Bowles* expressly represented that *Bowles* had no other property whatever except the balance of £140 12*s.*; that further proceedings against him would not benefit the creditors, but that if they would desist from so proceeding, *Bowles'* friends (and especially Defendant *Palmer*, who was his brother-in-law) would make up the £140 12*s.* to a sum sufficient to pay Plaintiffs and the other creditors a dividend of 6*s.* 8*d.* in the pound on their debts. The arrangement was carried into effect in December, 1868, and the composition of 6*s.* 8*d.* in the pound was accepted by Plaintiffs and the other unsatisfied creditors of *Bowles* in belief that the same was final and conclusive, and that *Bowles* had no other property than that which was included in the sale and had been given up by him towards payment of his creditors.

There was some conflict of evidence as to this voluntary settlement having been mentioned; it being stated on behalf of the Defendants that on Mr. *Hanbury* (Plaintiffs' solicitor) observing at one of the interviews that he presumed there was no other property, Mr. *Wynne*, the solicitor acting for *Bowles*, answered that he did not say so, and then mentioned that *Bowles* had lately made a settlement; to which *Hanbury* replied that it would be unavailing against creditors. Mr. *Hanbury*, on the other hand, stated that Mr. *Wynne* represented that *Bowles* was not, in fact, possessed of or entitled to any other property whatever, except the balance of £140 12*s.*

In April, 1870, Plaintiffs were (as the bill alleged) for the first time informed that at the time of the sale in August, 1868, and subsequent composition, *Bowles* was entitled, not only to the property which was sold, but also (subject to a voluntary settlement) to other property consisting of mortgage debts to the amount of £1300. By this voluntary settlement, which was dated the 28th of April, 1868 (at the time when the Plaintiffs were pressing for

payment), *Bowles* assigned to Defendants, *Palmer* and *Oddy*, the £1300 owing to him on the several mortgage securities therein recited, in trust to call in the moneys and apply a competent part in payment of any debts then owing by *Bowles*, and to pay the income of the residue to his wife for her sole and separate use, with trusts in favour of her appointees, and in default of appointment, for her next of kin, according to the *Statute of Distributions*.

The bill, which alleged that no notice of this settlement was given to Plaintiffs or any of the other creditors of *Bowles*, and that, so far as it purported to be a settlement for the benefit of creditors, it had never been acted upon, was filed in May, 1870, for the purpose of setting aside the composition and arrangement of December, 1868, and also the voluntary settlement of April, 1868. In September, 1870, the trustees of the voluntary settlement put in their answer, and in November, 1870, *Bowles* was adjudicated bankrupt, and *W. T. Hugo* (who had since been made a party to the suit in place of *Bowles*) was appointed his assignee.

Inquiries were instituted by *Hugo* as to the voluntary settlement made by *Bowles* in April, 1868, and private examinations of the bankrupt and *Palmer* and *Oddy* were taken.

On the 28th of April, 1871, an order was made by the Court of Bankruptcy setting aside the settlement of April, 1868, as void as against the creditors of the bankrupt, and directing the deed to be delivered to *Hugo*, the trustee in bankruptcy, to be held by him subject to the order of the Court, and that the securities be realized for the benefit of the creditors, leave being given to *Palmer* and *Oddy* to apply with reference to expunging or reducing any proof of debts made under the bankruptcy. Pursuant to this leave, *Palmer* and *Oddy* moved to expunge the proof of Plaintiffs on the ground of their having given receipts in full for their debt when the composition of 6*s.* 8*d.* in the pound was paid, and also that they were aware at the time of the voluntary settlement. On the 18th of July, 1871, the Registrar refused the motion holding that the Plaintiffs, when they assented to the composition of December, 1868, had not full knowledge of the facts as to the debtor's property and the voluntary settlement executed by him.

A portion of the settled funds had since been realised, and a

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dividend of 10s. in the pound declared and paid to the composition creditors, including the Plaintiffs.

On the 11th of July the Plaintiffs, being advised that, notwithstanding the order of the Court of Bankruptcy, it was necessary for them to proceed with the suit, wrote to the solicitor of the Defendants *Palmer* and *Oddy*, that it was not considered "necessary that we should continue your clients as Defendants in this suit, unless for the purpose of asking the Court, in accordance with the prayer of the bill, to decree costs as against them. In order to avoid this course it is suggested that you should consent to their being dismissed from the suit without costs. This we should be willing to concur in, and we should be willing to allow the Plaintiffs' costs to come out of the estate. We shall, therefore, be glad to hear from you whether you will consent to a petition for the dismissal of the bill as against your clients without costs."

In reply to this letter, the solicitor of *Palmer* and *Oddy* wrote on the 1st of August, 1871:—

"I cannot consent, on behalf of my clients, to an order merely dismissing them without costs, and allowing the Plaintiffs' costs to come out of the estate; but I am prepared to consent to an order staying all proceedings in the suit without costs, or dismissing the bill without costs, and I offer to do so, and shall make use of this offer if you persevere in the suit."

In consequence of this refusal, the suit was brought to a hearing for the purpose of determining the question of costs.

Mr. *Kay*, Q.C., and Mr. *Haddan*, for the Plaintiffs, referred to the examinations taken in bankruptcy, for the purpose of shewing that the settlement was purposely kept back from the creditors, and that *Palmer* was a party to the fraud. With respect to costs, in no case could the trustees of a voluntary settlement, which had been set aside as void against creditors, receive costs; the utmost that the Court could do in their favour being not to make them pay costs: *Elsey* v. *Cox* (1); and where a trustee who had an interest under the deed insisted upon its validity, the costs would be given against him: *Irwin* v. *Rogers* (2). In this case *Palmer* and *Oddy*

(1) 26 Beav. 95. (2) 12 Ir. Eq. Rep. 159.

had not only concealed the fact of the settlement, and insisted upon its validity as against the Plaintiffs, but had also, by their refusal of the offer of the 11th of July, 1871, compelled Plaintiffs to bring the suit to a hearing. They also referred to *Crossley* v. *Elworthy* (1).

Mr. *Winslow*, and Mr. *Wm. Pearson*, for the assignee in bankruptcy, contended that the Plaintiffs were not justified in bringing the suit to a hearing. The whole object of the suit was accomplished by the order in bankruptcy of the 28th of February, 1871, setting aside the deed of April, 1868; and the Plaintiffs, who had adopted the proceedings in bankruptcy and proved their debt thereunder, should have moved to stay proceedings in the suit, submitting the question of costs to the Court: *Elsey* v. *Adams* (2). They could not, however, go in under the bankruptcy and also go on with the suit.

Mr. *Amphlett*, Q.C., and Mr. *Ford North*, for the trustees (*Palmer* and *Oddy*):—

The letter of the Plaintiffs of the 11th of July asked for more than, while our answer offered everything that, they were entitled to, viz., a dismissal of the bill without costs; and we ask for the costs of suit subsequent to our letter of the 1st of August, 1871. When the subject matter of the suit is gone, or has ceased to exist before the hearing, so that the prosecution of the suit would be nugatory, the Court will not allow it to be brought to a hearing merely for the purpose of the costs. What the Plaintiffs should have done was to apply for Defendant's consent to having the costs disposed of on interlocutory application: *Morgan* v. *Great Eastern Railway Company* (3); *Wilde* v. *Wilde* (4); *Sutton Harbour Commissioners* v. *Hitchens* (5); *Sivell* v. *Abraham* (6); *Elsey* v. *Adams* *Morgan* and *Davey* on Costs (7). On the merits we do not contend that the settlement was one which could be supported, but there was no moral fraud in the transaction.

(1) Law Rep. 12 Eq. 158.
(2) 2 D. J. & S. 147; Dan. Chan. Prac. 144.
(3) 1 H. & M. 78.
(4) 4 D. F. & J. 318.
(5) 15 Beav. 161.
(6) 8 Beav. 593.
(7) Pages 50–52.

V.-C. B. 1872 TANQUERAY v. BOWLES.

SIR JAMES BACON, V.C.:—

That the suit was properly instituted I am bound to suppose, not only from looking at and reading the pleadings themselves, but from what has since taken place. Up to the time of the bankruptcy nobody can dispute that the suit was, in all respects, properly instituted and properly conducted. At the time of the bankruptcy matters had changed thus far that, instead of the bankrupt being personally liable, all the estate which was the subject of the suit, and all other the estate of the bankrupt, had become vested in the trustee in bankruptcy. The course of the trustee in bankruptcy was, in my opinion, so clear that it does not admit of a moment's hesitation. He might, and I think he ought to have applied to the Court to put a stop to that suit, for its progress could in no case be beneficial to the creditors, whatever was the result; and, in one view, it must be injurious to them. Costs had been incurred up to that time which, being costs of a suit which was properly instituted, must have been paid out of that estate which had by law become vested in the trustee in bankruptcy. In every interest, then, his plain duty was to put an end to the suit. If he had applied to the Court and had asked that, upon the terms of paying the costs up to that time, or upon any other terms that he suggested and the Court adopted, there should be an end of the proceedings as against the bankrupt's estate, an order to that effect must have been made. It is because the trustee neglected his plain duty in that respect that the suit has gone on, so far as he is concerned. The costs up to the time of his appointment, therefore, must, in my opinion, be borne by the estate realized by the trustee in bankruptcy. The subsequent costs I do not think should be dealt with in the same way; but as a trustee in bankruptcy is entitled to the costs of realising the bankrupt's estate, I think that the trustee would be entitled to retain out of the funds in his hands the costs of realising the estate; but he is not entitled to be paid out of the estate any subsequent costs of this suit, and is not liable to pay any subsequent costs of this suit. The case of the trustees under the deed is wholly different. There was a time at which Plaintiffs, finding that to prosecute the suit in its ordinary regular manner would not be advantageous either to them or to anybody else, pro-

posed to the trustees to put an end to the suit upon terms which seem to me to be perfectly just and reasonable—to release the trustees from all that personal liability which was suggested by the frame of the record, and that the Plaintiffs should have their costs up to that time, which were then inconsiderable as compared with those since incurred, out of the estate. If that offer had been accepted, there would have been an end of it. The trustees, by declining to accept that offer, imposed upon the Plaintiffs the necessity of going on with that suit, and it is their reply which has made it absolutely necessary that the cause should be prosecuted to a hearing. [His Honour, after referring to the letter of Defendant's solicitors of the 1st of August, 1871, continued:—] What was the position of the trustees at that time? The deed, so far as it affected the interest of creditors, was an invalid deed; but beyond that, so far as it declared trusts in favour of the bankrupt's wife, or any other persons, it was a perfectly valid deed. Nothing that has happened has shaken its validity in that respect, and the trustees are trustees of all that remains after satisfying the creditors. The meaning of what the trustees say is, "We consent to have this bill dismissed without costs; you shall pay your own costs; any surplus which may arise after payment of the bankrupt's creditors is ours—that we will retain; you shall not touch for your costs any part of that fund which may remain after payment of the bankrupt's creditors." Well, was that right? If the suit was rightly instituted, and if there had been more than enough to pay the bankrupt's creditors, the costs of a suit properly instituted and properly conducted must have come out of that fund. But the conduct of the trustees does not rest there. If there was anything equivocal (as I think there was not) in this letter, it would have been made apparent by the subsequent conduct of the trustees, for, having this offer made to them, and having rejected it in the terms and upon the ground stated in their letter, they proceed to apply in bankruptcy to expunge the debt of the Plaintiffs. If they had succeeded, that would have increased the surplus coming to them. They were still claiming the surplus, and they could have no other ground on which to apply to expunge it.

[Mr. *Amphlett*, Q.C., observed that the application in bankruptcy

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was before the letter of the trustees; but His Honour observed that this made no kind of difference.]

In my opinion the whole of the costs which have been incurred subsequent to that offer to dismiss the bill without costs have been occasioned by the trustees, and by the trustees alone. Reference has been made to the cases of *Sivell* v. *Abraham* (1), *Wilde* v. *Wilde* (2), *Morgan* v. *Great Eastern Railway* (3), and also to *Elsey* v. *Adams* (4); but those cases when examined will be found to be by no means authorities for the arguments that have been built upon them. This is not a case in which the subject matter of the suit has been destroyed; it is not the case of an estate swept away by the sea or devoured by an earthquake; but there is still the identical estate, the same subject matter which was existing when the bill was filed, and it is to be dealt with and distributed now by the trustee in bankruptcy, whose conduct seems to me to have been in all respects perfectly right, except that he did not put a stop to the suit. By his exertions this settlement has been utterly destroyed, and the whole of the property comprised in it is devoted to the payment of the creditors. I do not touch the disputed portion of evidence as to the interview between Mr. *Hanbury* and Mr. *Wynne* and his clerk. Even according to the statement of *Wynne* and his clerk, was it the sort of information that ought to have been given to the Plaintiffs in answer to the sort of inquiry that was then made? That it was the duty of the trustees to put an end to the suit, or to agree to put an end to the suit upon the terms suggested to them, I have not the slightest doubt. After their letter the Plaintiffs could not apply. *Wilde* v. *Wilde* and the other cases referred to shew that the Plaintiffs could not have applied, for the trustees would have said then, "There is a question yet to be decided at the hearing; this is no case in which you can dismiss the bill either without costs or on any other terms; the cause must go to a hearing." What they have said is quite equivalent to that. I think, therefore, the Plaintiffs are entitled to have their costs out of the bankrupt's estate up to the time of the appointment of the trustee in bankruptcy, and also

(1) 8 Beav. 598.
(2) 4 D. F. & J. 348.
(3) 1 H. & M. 78.
(4) 2 D. J. & S. 147.

10 Jur. N.S. 459.

that the offer not to ask for any costs against the trustees of the voluntary settlement up to August, 1871, ought to be adhered to; but as to all the Plaintiffs' costs subsequent to that, the trustees are liable to pay them, because they, and they only, have occasioned those costs by their conduct, which shews an attempt to defeat Plaintiffs' claim, and to deprive them of having recourse to the fund out of which they claim to have payment of their costs, while the trustees claim the fund beneficially for themselves.

MINUTE OF ORDER:—Plaintiffs' costs of suit up to appointment of trustee in bankruptcy to be paid out of bankrupt's estate now undistributed. The costs of realising the estate by the trustee in bankruptcy to come out of the estate after the above costs. The Plaintiffs' costs of suit, after the appointment of the trustee in bankruptcy up to the offer of July, 1871, to come out of the bankrupt's estate. The trustees of the settlement to have no costs, but to pay all Plaintiffs' costs incurred since the letter of the 1st of August, 1871.

Solicitors: Messrs. *Tanqueray-Willaume & Hanbury;* Mr. *W. W. Wynne.*

V.-C. W.
1872
April 16, 24.

BURT *v.* HELLYAR.

[1870 B. 146.]

Will—Construction—Tenancy for Life—Gift of Residue in Fee—"Surviving Children or their Families"—Children or Descendants—Partition Suit—Jurisdiction—Form of Decree.

23 Ch D 738

Testator, who died in 1854, gave all his property to his wife for life, and after giving certain pecuniary legacies and annuities, devised and bequeathed to his son *C.* all the residue, after his mother's decease, and to his heirs, and in case *C.* should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of *C.*, who died in 1869 a bachelor and intestate:—

Held, that this was, like that in *King* v. *Cleaveland* (1), a gift on the death of *C.* without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead:

Held, also, that "families" meant children, and not descendants of the testator's children.

In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided in this Court.

THOMAS HELLYAR, who died on the 27th of September, 1854, by his will of that date, after directing that his debts, funeral expenses, and certain costs should be paid by his wife, to whom he gave all his property for life, whether freehold, leasehold lands, tenements, hereditaments, goods, chattels, credits, or effects, and after giving certain annuities (since determined) and pecuniary legacies, proceeded as follows: "All the rest, residue, and remainder of my estate and effects, . . . whatsoever and wheresoever situate, of which I may die seised or possessed, ... I give, devise, and bequeath to my son *Charles* after his mother's decease, and to his heirs; in case he should die leaving no issue, then my freehold estate shall be equally divided between my surviving children or their families." He appointed his son *Charles* sole executor of his will.

(1) 4 De G. & J. 477.

The testator's widow died in December, 1861.

Charles Hellyar proved the will, and died in July, 1869, a bachelor and intestate.

The testator left seven children, six sons, *William*, *Charles*, *Francis*, *John*, *Samuel*, and *Richard*, and one daughter, *Mary Ann*.

Francis died in the lifetime of *Charles*, leaving seven children.

John died in October, 1863, leaving a grandson and a daughter.

Samuel died in March, 1864, leaving three children.

Richard died in 1867 a bachelor and intestate.

Mary Ann died in July, 1868, a widow, intestate as to real estate, and without issue.

William (a Defendant), the eldest brother of *Charles*, had been in possession of the estate under an arrangement with the other persons alleged to be interested therein to account for the rent upon the footing of the Plaintiffs—some of the children and grandchildren of *Francis*—and himself and others, Defendants, being tenants in common; but he had recently claimed to be sole owner under the will. The Plaintiffs prayed for a partition; that their shares might be ascertained and declared, with liberty, if necessary, to charge a sum or sums in gross for equality of partition; and that the respective shares allotted on partition might be held and enjoyed in severalty, or, if the Court should think fit, that the property might be ordered to be sold, and that the proceeds might be distributed amongst the persons interested therein.

Mr. *Greene*, Q.C., and Mr. *Langworthy*, for the Plaintiffs:—

The questions raised are confined to the freehold estate. It is submitted, first, that the word "families" means children of the testator's children; next, that the shares of the testator's children, who died in the lifetime of *Charles*, and which they would have taken if they had been living at the death of *Charles*, go to their children by substitution; and lastly, that the period of distribution was the death of *Charles*.

Where there are words of division as in this case, the primary meaning of the word "families," viz., children, obtains: *Barnes* v. *Patch* (1); *In re Terry's Will* (2); *Price* v. *Lockley* (3).

(1) 8 Ves. 604. (2) 19 Beav. 580. (3) 6 Beav. 180.

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Substitution was intended by the testator in case any of his own children should die before *Charles: King* v. *Cleaveland* (1); *In re Philps' Will* (2). The gift being to all his children who should survive *Charles,* or to the families of such children who predeceased *Charles,* the Plaintiffs and the Defendant *Henry Hellyar,* who together represent one of the testator's children, will be entitled to one-fourth of the estate. There is nothing in the will which gives a vested interest to the testator's children who predeceased *Charles.* The period at which the class is to be ascertained is the death of *Charles: In re Gregson's Estate* (3).

It is submitted that the property is divisible in fourths between the testator's son *William,* the Plaintiffs and the Defendant *Henry,* the daughter of the testator's son *John,* and the children of his son *Samuel.*

Mr. *R. W. E. Forster,* for some of the Defendants, adopted the argument submitted on behalf of the Plaintiffs, and for other Defendants contended that the word "families," applied as in this case to real estate, mean "heirs": *Wright* v. *Atkyns* (4); *Roper* on Legacies (5); that the same word applied to personal estate meant next of kin: *Woods* v. *Woods* (6); and that in this case surviving children meant those only who survived *Charles.*

Mr. *Lindley,* Q.C., and Mr. *Bevir,* for the Defendant *William Hellyar,* the only surviving child and the heir-at-law of the testator:—

One question is, whether the death of the testator, of the widow, or of *Charles* is the period of distribution? Assuming that the death of *Charles* is the true construction, it is submitted that the Defendant *William* takes the whole of the estate; for "or" refers to the prior event—the deaths of all the children before *Charles;* but as *William* alone survived *Charles,* he takes the whole.

If such a construction be not adopted, then it is submitted that "families" here means "heirs": *Counden* v. *Clerke* (7); *White* v.

(1) 26 Beav. 26; 4 De G. & J. 477.
(2) Law Rep. 7 Eq. 151.
(3) 2 D. J. & S. 428.
(4) 17 Ves. 255.
(5) 4th Ed. 139.
(6) 1 My & Cr. 401.
(7) Hob. 29.

Briggs (1); *Jarman* on Wills (2); *Hawkins* on Wills (3). The clause ought to be read as if it were "surviving children or their heirs," and "or" ought to be construed as if it were "and": *Horridge* v. *Ferguson* (4); *Eccard* v. *Brooke* (5); *Harris* v. *Davis* (6); *Jarman* on Wills (7). *Barnes* v. *Patch* (8) is distinguishable from this case, as there the fund was a mixed one. The shares of those children of the testator who died without issue belong to their heir-at-law, *William*.

It is submitted, however, that the death of *Charles* is not the proper time for distribution, but that of the testator or that of his widow; it is immaterial which, for *William* takes as from the death of his mother, and he will be entitled, on the construction that the families of children are entitled, to four-sevenths: *Shailer* v. *Groves* (9); *Armstrong* v. *Stockham* (10); *Jarman* on Wills (11). It may be added that *William* desires a partition and not a sale.

[They also cited *Wright* v. *Wright* (12); *Lachlan* v. *Reynolds* (13); *Hamilton* v. *Mills* (14); *Lucas* v. *Goldsmid* (15).]

Mr. *Greene*, in reply:—

In *Wright* v. *Atkyns* the words on which the question arose were "to my family." There the course of devolution was pointed out, and the devisor's heir was considered as *persona designata*. "Families" here is not a word of limitation; and, consequently, nothing goes to the heir-at-law beyond the one-fourth given to him by the will.

SIR JOHN WICKENS, V.C.:—

The question in this case arises under the will of *Thomas Hellyar*, dated the 27th of September, 1854.

[After stating the facts, His Honour continued:—] It seems to me that this gift must be construed like that in *King* v. *Cleaveland* (16),

(1) 2 Ph. 583, 587.
(2) 3rd Ed. vol. ii. pp. 82, 84.
(3) Page 90.
(4) Jac. 583.
(5) 2 Cox, 213.
(6) 1 Coll. 416.
(7) 3rd Ed. vol. i. 481.
(8) 8 Ves. 604.
(9) 6 Hare, 162.
(10) 7 Jur. 230.
(11) 3rd Ed. vol. ii. 182–691.
(12) 1 Ves. Sen. 409.
(13) 9 Hare, 796.
(14) 29 Beav. 193.
(15) Ibid. 657.
(16) 4 De G. & J. 477.

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as a gift, on the death of *Charles* without leaving issue at his death, to the other children of the testator then living, and the "families" of such of them as should be then dead. That this construction involves a grammatical inaccuracy is obvious; but it gives effect to the probable intention, and has strong authority in its favour. If *King* v. *Cleaveland* (1) applies to this case, the only question is as to the meaning of the word "family." This is a popular and not a technical expression, and may mean several different things, as was pointed out by Lord *Langdale* in *Blackwell* v. *Bull* (2), and by Vice-Chancellor *Kindersley* in *Green* v. *Marsden* (3). But the nature of the gift in the present case excludes many of the possible constructions. It is almost impossible, I think, to construe it here as including any one but blood relations in the descending line; that is, as meaning anything but descendants, or some class of descendants. The words of division import a separation between the families, which excludes any such construction as that of heirs general or blood relations generally. There seem to me to be three different ways in which a gift of real estate to a family may be construed without going beyond the relations in the descending line of the person whose family is mentioned, namely, heirs of the body; children; and descendants of all degrees. The first of these constructions might possibly be considered as the preferable one if the testator's presumable object had been to keep an estate together in a particular line. But it is certainly an unnatural construction of the word "family," as here used; and I do not think that either *Wright* v. *Atkyns* (4), or any other decided case, makes it necessary to adopt it. The question is, therefore, one between "children" and "descendants." The former construction is supported by Sir *William Grant's dictum* in *Barnes* v. *Patch* (5), and by *Gregory* v. *Smith* (6), *In re Terry's Will* (7), *In re Parkinson's Trusts* (8), and many other cases. It is, also, I conceive, in accordance with common usage. If the testator had spoken in ordinary conversation about one of his sons having a family, or had mentioned the family of one of them, he would in nearly

(1) 4 De G. & J. 477.
(2) 1 Keen, 176, 181.
(3) 1 Drew. 646, 651.
(4) 17 Ves. 255; Coop. G. 111.
(5) 8 Ves. 604.
(6) 9 Hare, 708.
(7) 19 Beav. 580.
(8) 1 Sim. (N.S.) 242.

every case have meant that son's children. No doubt the cases which I have referred to, except *Barnes* v. *Patch* (1) (which is the case of a mixed fund), are cases of personal estate. This distinction seems immaterial where the question is only whether the word "family" shall include a larger or smaller class of descendants. The remark that the testator had used the word "issue" correctly in the very sentence in which the word "family" occurs is a very trifling circumstance, but tends more or less to the same result.

On the other hand, in *Williams* v. *Williams* (2) "family" was construed as descendants. And Mr. *Jarman* appears to have considered that in general the larger meaning would prevail in case of contest. No doubt in many wills it would be the probable and convenient meaning, as in many other wills the probable intention would include all blood relations. In the present will the convenient, and therefore probable, meaning seems to me to be children. According to *Lanphier* v. *Buck* (3), the persons who would take here under the word "family" are not required to survive the death of *Charles* without issue, or even to survive the brothers or sister of *Charles*, from whom they descend. Therefore in either construction every child of every brother or sister of *Charles* living at the testator's death, or born after it, would take an interest; though as each family would take in joint tenancy as between themselves, this interest, in the absence of severance, might cease by death. And if the larger construction is adopted each descendant coming into existence during the particular estate would take with its parent if alive. This seems to me an improbable intention, as Lord *Cranworth* thought in *Williams* v. *Williams*. I am quite sure that the testator in this case would not have desired that his great grandchildren (of whom he seems to have had none at the date of his will), the offspring of living parents, should, as soon as born, become equally entitled with their parents. Possibly if he had had full knowledge, and had given the matter full consideration, he might have desired to provide for a great grandchild, the son of a deceased parent who had lost his share by death. But he would hardly have done so by making the share of one of his children go among that child's descendants

(1) 8 Ves. 604. (2) 1 Sim. (N.S.) 358. (3) 2 Dr. & Sm. 484. 11 Jan 1887

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of all generations who might come into existence during *Charles's* life. Probably he had no idea of looking beyond the generation of his own grandchildren (the remotest generation then existing) for any purpose whatever. I hold, then, that the gift in the events which happened passed one undivided fourth to *William*, one to the six plaintiffs and their brother *Henry Hellyar*, as joint tenants, one to the surviving daughter of *John*, and one to the three children of *Samuel*, who also take as joint tenants.

This assumes that no severance of any sort took place in *Charles's* lifetime. The will and the evidence in support of it raise questions distinct from that of construction, but I think that they were not pressed at the hearing, so that the decree will be one for partition merely.

I may observe that the question which I have decided is one of law and not of equity, and that a partition suit being an exercise by the Court of administrative rather than contentious jurisdiction, it might not have been right that I should have dealt with it if any one objected. But no one did object, in fact; and I think that, under the circumstances, I do not go beyond the limits of my proper jurisdiction, and that I do what is best for the parties, by now deciding the case. It will be proper, however, to preface the decree with a statement of the desire of all parties, other than the infant, that the questions should be decided here and now.

Solicitors: Messrs. *Emmets, Watson, & Emmet*, agents for Mr. *H. F. Whitefield, St. Columb, Cornwall;* Messrs. *Coode, Kingdon, & Cotton*, agents for Mr. *George Brown Collins, St. Columb, Cornwall.*

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[1871 T. 9.]

V.-C. W.
1872
April 17, 22, 23.

Trustee and Cestui que trust—Family Arrangement—Release by Married Woman —Recital—Settled Account—Lapse of Time—Liability of Derivative Trustees.

A testatrix died in 1848, having by her will, made the day before her death, bequeathed one-fourth of the residue of her personal estate to two of her sons, in trust for her daughter *A.*, then the wife of *R. D. T.*, for her life, for her separate use, without power of anticipation; and on her death for her children; but did not appoint any executors of the will. The testator left four children. In 1850 a family arrangement was entered into by which the property was divided into fourths. Certain securities were then appropriated to meet the share of *A.* Her fourth and that of one of her brothers (a trustee) were calculated on the footing of their having each received £400 from the testatrix in her lifetime; which sum was accordingly deducted from their respective shares. The brother (the trustee) died in 1860. *A.* died in 1870, having received the interest on her share, less the £400. The legal personal representatives of the then trustees of the will declined to make good to the children of *A.* the difference between the value of one-fourth part of the estate and the amount actually set apart to answer the bequest in favour of *A.* and her children. They justified that refusal by producing a release, executed in 1850, by *A.* (but not by her husband), containing a recital to the effect that the £400 had been advanced by the testatrix to *A.* in her lifetime, with her husband's consent, "in part of and to be deducted out of any legacy or sum of money which the testatrix might leave by will to *A.* or her issue;" and the accounts of the testatrix's estate, in the hands of her solicitors, to shew that a sum of £400 had been advanced to *A.* as stated. Upon a bill filed in 1871 by the children of *A.* against the legal personal representatives of the original trustees to compel them to pay the amount of the difference in question:—

Held, that the Plaintiffs were entitled to a decree, with costs up to the hearing.

MOTION FOR DECREE.

Mary Mathews, widow, by her will, dated the 30th of March, 1848, bequeathed the residue of her personal estate to her two sons, *Edward* and *Thomas*, upon trust as to one-fourth for *Edward*, absolutely; as to another fourth for *Thomas* absolutely; as to another fourth for her son *Joseph* and his wife and children, as therein mentioned; and as to the remaining fourth for her daughter *Ann*, then the wife of *Richard Dudley Taylor*, for her life, for her

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separate use, without power of anticipation; and after her death for all and every the child and children of the said *Ann Taylor*, who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, if more than one, in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively. The testatrix died on the 31st of March, 1848, leaving *Edward Mathews*, *Thomas Mathews*, *Joseph Mathews*, and *Ann Taylor*, her four children.

On the 23rd of June, 1848, administration with the will annexed of the estate of the testatrix was granted to *Edward Mathews* and *Thomas Mathews*.

In 1850 *Edward Mathews* and *Thomas Mathews* prepared a general statement of the testatrix's estate, from which it appeared that the clear residue of it, not specifically bequeathed, after payment of debts, funeral, and testamentary expenses, amounted to the sum of £5821 3*s.* 5*d.* In arriving at that sum they took credit for a sum of £400, which they alleged to be due to the estate from *Ann Taylor*. They accordingly divided the estate, on the footing of its being that sum of £5821 3*s.* 5*d.*, deducting, however, the sum of £400 from the share bequeathed to them in trust for *Ann Taylor* and her children, so as to make that share £1055 3*s.* 10*d.* only. They then executed a declaration of trust dated the 1st of August, 1850, whereby they declared that two several mortgage securities, for £600 and £420 respectively, and the sum of £35 5*s.* 10*d.* cash, should stand limited upon the trusts in the will declared of and concerning the one-fourth part of the testatrix's residuary estate settled upon *Ann Taylor* and her children.

At the same time, viz., the 1st of August, 1850, a release of that date was executed by Mrs. *Ann Taylor*, containing a recital "that the testatrix during her lifetime advanced to the said *Ann*, the wife of the said *Richard Dudley Taylor*, with his privity and consent, the sum of £400, in part of and to be deducted out of any legacy or sum of money which the testatrix might leave by will to the said *Ann Taylor* or her issue." That release was not however executed by Mr. *Taylor*.

Thomas Mathews died in 1861, having by his will appointed

Edward Mathews and *Edward Cartwright* and *Joseph Proffitt* his executors, of whom the two last-named duly proved the will.

Edward Mathews died in 1869, having by his will appointed *John William Mathews* and *Edward Cartwright*, his executors, who duly proved the will.

Ann Taylor died in 1870, having had seven, but leaving only six children (who all attained their respective ages of twenty-one years in or prior to 1867) and her husband.

On the death of *Ann Taylor* her children applied to the executors of *Edward Mathews* for an account of the one-fourth share of the estate of the testatrix to which they were entitled. The executors furnished an account, from which it appeared that the estate had been dealt with on the footing of the deduction of the £400 from *Ann Taylor's* share; and further also, that the share of *Thomas Mathews* had (with his consent) been subject to a similar deduction. The children thereupon requested the representatives of *Edward Mathews* and *Thomas Mathews* to make good to them the difference between the value of one-fourth part of the testatrix's estate, and the amount actually set apart to answer the bequest to *Ann Taylor* and her children.

The representatives of the trustees refused to comply with this request, and justified their refusal by producing the release of the 1st of August, 1850, the recital in which they believed to be true, and the solicitor's accounts of the testatrix's estate, in corroboration of the advance of the £400.

The children of *Ann Taylor* thereupon filed the bill in this suit against the legal personal representatives of the trustees of the will of *Mary Mathews*, alleging that the Plaintiffs were not bound by the release, and had not in any manner acquiesced in the mode in which the trustees of the will had dealt with the estate, and praying a declaration that *Edward Mathews* and *Thomas Mathews* were bound to have set apart and held in trust for *Ann Taylor* and her children one equal fourth part of the clear residue of the estate of the testatrix, and that the estates of *Edward Mathews* and *Thomas Mathews* were now jointly and severally liable to make good the difference between the value of one equal fourth part of such residue, and the amount actually set apart by them in trust as aforesaid; that the Defendants might be ordered to pay the amount of such

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difference to the Plaintiffs out of the estates of their respective testators, or in case they should not admit assets sufficient for the purpose, then that the estates of their respective testators might be administered under the direction of the Court; that if necessary the estate of the testatrix might be administered, and the trusts of her will carried into execution under the decree of the Court; that the Defendants might be ordered to pay the costs of the suit; and for further relief.

With respect to the execution of the release, Mr. *Taylor* deposed that the belief of the Defendants that a sum of £400 was advanced to his late wife by the testatrix was not founded on fact; for that no such sum was ever advanced to his wife by her mother, and that it never was admitted but had always been denied by him, that the same or any other sum was ever so advanced by the testatrix, either to his wife or to him. The accounts of the testatrix's estate had been submitted to him, but he had not signed them, because his wife was thereby charged with the said sum of £400, and because the accounts did not contain a full and true statement of such estate; which he then believed, had reason to believe, and still believed, was of much larger amount than such statement represented it to be. He was asked to execute the release of the 1st of August, 1850, but declined to do so, as well on the general ground that the whole of the estate of the testatrix had not been accounted for as also on the special ground that it was sought to charge the share of the estate to which his wife and children were entitled with the sum of £400, and to deduct the same therefrom, and that the statement in the release with respect to such a sum having been advanced to his late wife was untrue and without foundation. He said that although the release was (he believed) executed by his late wife the same was so executed by her, notwithstanding the statements contained therein were not true, solely for the purpose of maintaining a good understanding between herself and her brothers *Edward Mathews* and *Thomas Mathews*, who were the trustees on her behalf under the will, and particularly with the former, who was a bachelor of large property, and whose displeasure she was desirous not to incur.

The Defendants, on the other hand, by their answer insisted on

their belief that the £400 had been in fact advanced to Mrs. *Taylor* on her marriage by the testatrix, and on the understanding that it was to be deducted from any share coming to her or her children, under the will. They relied on the settled accounts of the testatrix's estate and some memoranda of her solicitors, shewing the payment of a sum of £400, together with the evidence of her solicitor as to the transactions of 1850. They stated that Mrs. *Taylor* (as they believed) had during her life received interest only on the sum of £1055 5*s.* 10*d.*; and that the Plaintiffs had received the interest on the two mortgage debts appropriated as the share of Mrs. *Taylor's* children in the residue, since her death. They submitted that the length of time which had elapsed since the death of the testatrix was a fatal bar to the Plaintiffs' claim; and while admitting their willingness to distribute the £1055 5*s.* 10*d.* among the children of Mrs. *Taylor*, contended that this suit was unfounded and vexatious, and that the Plaintiffs ought to bear the costs of it.

Mr. *Greene*, Q.C., and Mr. *Macnaghten*, for the Plaintiffs:—

The Defendants here rely on, lapse of time, a settled account, and a release.

But if we are right there has been a breach of trust, to which lapse of time is no answer. The settled account was one between the testatrix and her solicitors, and cannot possibly affect the Plaintiffs, who were no parties to it; and the release (if it be one) is the release of a married woman, which would not have estopped her had she been living; and *à fortiori*, therefore, cannot now bar her children.

Assuming however that this £400 was paid by the testatrix to Mrs. *Taylor*, it must have been either a gift, or not a gift. If the former, the deduction was clearly wrong; if the latter, it must have been either an advance or a loan. But there is no evidence that it was an advance. If, however, it could be shewn to have been an advance (which we deny), still the trustees had no right to deduct it from her share: *Holt* v. *Frederick* (1). If it was a loan it was no doubt intended to be repaid by Mrs. *Taylor* at some

(1) 2 P. Wms. 356.

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time or other; but of course out of her estate. The Plaintiffs however are now absolutely entitled to the share which was their mother's, and they can clearly call for the payment of that which is their own to them, without any deduction.

Mr. *Karslake*, Q.C., and Mr. *Graham Hastings*, for the Defendants:—

This is not a simple case of breach of trust. The Defendants are not the trustees of the will, but derivative trustees only, and in no way personally responsible for anything that has been done. We rely both on the lapse of time and on acquiescence.

There was a family arrangement so long ago as 1850, into which all parties then competent duly entered. *Thomas Mathews* allowed the deduction of £400 from his share, and it must be assumed on the evidence that the ground for that deduction was the same as for that from his sister's share. The Plaintiffs, therefore, cannot now, in 1871, disturb that solemn settlement of the family property: *Browne* v. *Cross* (1); *Jones* v. *Higgins* (2).

It is true that they say they did not acquiesce in what the original trustees did with the testatrix's estate; but the Defendants believe (and it is not denied) that the Plaintiffs received the interest on the mortgage debts appropriated to their share since Mrs. *Taylor's* death. If that is so, then, although they may not have acquiesced in, and may even have been ignorant of the circumstances of the arrangement of 1850, they have since adopted it, and cannot at this late hour be allowed to alter it. They are in fact now bound by the acts of Mrs. *Taylor* and their own; at all events, Mr. *Taylor* is bound: *Bentley* v. *Mackay* (3), *Clifton* v. *Cockburn* (4).

[Mr. *Greene* cited *Life Association of Scotland* v. *Siddal* (5).]

It may be that they are not specifically bound by the stated accounts; and moreover, we do not deny that Mrs. *Taylor's* release, being that of a married woman, will not bar her children claiming after her. But we are entitled to look at the solicitor's accounts

(1) 14 Beav. 105.
(2) Law Rep. 2 Eq. 538.
(3) 31 Beav. 143.
(4) 3 My. & K. 76.
(5) 3 D. F. & J. 58.

of the estate, and to take the fact of the execution of the release by Mrs. *Taylor*—the latter being the admission of a deceased person, against her own interest—as clear proof of the payment of the £400; and we do so. Then, further, we say that, on the whole of the evidence in this case the presumptions are, first, that as the testatrix died the day after she made her will the payment of the £400 preceded it; and, secondly, that the payment was an advance by the testatrix which she meant should operate as an ademption or satisfaction *pro tanto* of Mrs. *Taylor's* expectant share under the will: *Kirk* v. *Eddowes* (1); *Powys* v. *Mansfield* (2); *Sugden's* Real Property Cases (3); *Hopwood* v. *Hopwood* (4); *White* and *Tudor's* Leading Cases (5); *Upton* v. *Prince* (6); *Stapilton* v. *Stapilton* (7); *Brooke* v. *Lord Mostyn* (8).

Mr. *Greene*, in reply:—

The authorities referred to by the other side have no proper bearing on this case. As presented to the Court it affords no real difficulty. In truth, there is no evidence at all of any such advance as is relied upon by the Defendants, and no date for it is given in any of the pleadings. So far, therefore, *cadit quæstio*.

Then it is said the Plaintiffs are bound by the arrangement of 1850. But what is required to be shewn to preclude them from succeeding here is, that the testatrix intended the £400 should be deducted from Mrs. *Taylor's* share, or in other words, an agreement between the testatrix and Mrs. *Taylor*, or her husband, that the £400 should be deducted from what is now the Plaintiff's share of the property. There is, however, no proof of any such intention or agreement. The cases cited as to ademption were cases in which a legacy has been adeemed by something done by the testators themselves after the date of their will. *Upton* v. *Prince*, which is the nearest case to this one, was one of contract, and clearly distinguishable. To hold the Plaintiffs bound by the alleged family arrangement would be to say that parents can "arrange" their children out of their children's own property; which is absurd. But it is

(1) 3 Hare, 509.
(2) 6 Sim. 528; 3 My. & Cr. 359.
(3) Page 128.
(4) 7 H. L. C. 728.
(5) Vol. ii. 350.
(6) Cas. t. Tal. 71.
(7) 1 Atk. 2.
(8) 33 Beav. 457; 2 D. J. & S. 373.

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also said that the Plaintiffs acquiesced in what has been done. How can that be? They knew nothing about the property, and could not ascertain anything as to it till the death of their mother in 1870. Without knowledge there can be no acquiescence; and when they did find out the facts, viz., in 1870 or 1871, they filed their bill in this suit.

On all these grounds I ask for a decree, and with costs.

April 23. SIR JOHN WICKENS, V.C.:—

Mary Mathews, the testatrix, died on the 31st of March, 1848, having by her will, dated the day before her death, bequeathed one fourth of her residuary personal estate to her daughter *Ann* for life, for her separate and inalienable use; and on *Ann's* death to her children who, being sons, should attain twenty-one, or daughters, marry. The other three-fourths she bequeathed to her sons. Administration with the will annexed was granted to *Edward* and *Thomas Mathews*, two of the residuary legatees, there being no appointment of executors. *Ann* died in May, 1870, and the Plaintiffs, her children, who attained twenty-one at various times between the 20th of April, 1857, and the 13th of April, 1867, filed this bill in 1871. On such a bill, if properly framed for that purpose, the Plaintiffs would have been clearly entitled to a decree for administration; though if the administrators with the will annexed had wound up the estate shortly after the testatrix's death, and relied on what they did at that time, as presumably regular, the Court would have taken care that they should not suffer by the loss of vouchers, and probably have fixed the Plaintiffs with all the costs of the suit, if the accounts had been fairly submitted to the Plaintiffs, and in the result were not displaced.

In the present case it appears that two years after the testatrix's death an account was taken; by the result of which the clear residue, as received by the administrators, was ascertained at £5021 3*s.* 5*d.* In 1850 a division was made on that footing. A share less than one-fourth being attributed to *Ann* and her children, and a share less than one-fourth being attributed to her brother *Thomas*, another residuary legatee, and one of the adminis-

trators, on the ground of alleged advances of £400 each to those two. The other brothers took each a full fourth of the estate, after including in it the alleged advances to *Ann* and *Thomas*. That division, it should be observed, was embodied in certain deeds dated in August, 1850, one a declaration of trust of certain securities which were set apart to answer the share of *Ann* and her children, and the other a release to the executors purporting to have been intended to be made by *Ann* and her husband, and to contain a covenant for indemnity by the latter, but which *Ann's* husband refused to execute. It was argued that he was bound by it, but on no valid or even plausible grounds.

What the Plaintiffs now seek to do, though the Bill is not quite aptly framed for the purpose, is to adopt the statement of the amount of residue and to rectify the principle of division. Their bill is not one to administer the trust of any deed executed at the time of the division; nor can the estate be administered under it, since there is no legal personal representative of the testatrix before the Court: hence it seems to have been demurrable for want of parties. But those difficulties, which are merely technical, may, be got over in the interests of justice. And I may consider the question (which was fully argued), whether the division must not be taken, as against the Plaintiffs, who are no parties to it, to be erroneous?

Of course the assent to it of a married woman, who was tenant for life without power of anticipation, could not bind her children entitled to the capital in remainder; and as the division of the estate on which it proceeded was not *primâ facie* the proper one, that division, if sustainable at all, must be so independently of the effect of the release. In order to sustain it reliance was placed on a recital in the release (and in the declaration of trust also), which is in the following words: "Whereas the said *Mary Matthews*, during her lifetime, advanced to the said *Ann*, the wife of the said *Richard Dudley Taylor*, with his privity and consent, the sum of £400, in part of and to be deducted out of any legacy or sum of money which the said testatrix might leave by will to the said *Ann Taylor*, or her issue."

It was argued that that recital is evidence that an advance of £400 was made to *Ann*, with the intention that it should go in

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diminution of any share to be given by a will, afterwards made, to herself or her issue. It seems to me clearly not to import an advance to *Ann* while unmarried, or an express contract by her, whether married or unmarried, that it should be accounted for in that special way. There is no presumption of law that the payment of a sum of money to a child, even by a father, before the date of the will is to go against a legacy to that child. If there be a contract by the child that it shall do so, as in *Upton* v. *Prince* (1), that contract may be perfectly valid. If the child is informed by the testator that he is intended to take the legacy on the understanding that he shall make good a certain sum to the other residuary legatees, and acquiesces in it, that might possibly be binding on his conscience, as in the analogous case of secret trusts. But it would be difficult, I think, in any case to hold that a gift by the will of *A.*'s father to *A.* for life, with remainder to his children, was adeemed by anticipation, by a gift to *A.* made long before the will; though the testator, when he made the gift, verbally, intimated that his intention was that it should have that effect. Therefore, even assuming that the recital referred to is evidence for any purpose whatever, I must treat it as not proving in any way the existence of a state of things which would have warranted the deduction of the £400 from *Ann's* share; and as *Ann's* consent and release did not bind the Plaintiffs, it must, I think, be assumed that the deduction is not shewn to have been properly made as against them. If so, they would seem entitled to have the securities appropriated to their mother's supposed share, *plus* the £400, with interest since her death.

It was, however, alleged that there was acquiescence on their part. That appears to me to be wholly untenable. It is not alleged, or proved, or likely, that there was knowledge of the facts; and without that it is almost impossible to attribute laches to a person whose interest is reversionary because he does not sue before it vests in possession.

The question remains, whether the Plaintiffs have shewn their title to a decree such as I have already mentioned, accepting the amount of residue as stated, and the appropriation as good *pro tanto*, and getting the £400 (or whatever, on taking the accounts,

(1) Cas. t. Tal. 71.

the proper sum may be,) from the brothers' estates. It should be observed that *Edward* and *Thomas Mathews* are both dead, and their executors are before the Court. *Joseph Mathews*, the other residuary legatee, is not represented, but no objection was taken on that ground.

It was suggested that if the settlement of 1850 were not binding on *Ann's* children, it ought not to bind *Thomas*, who consented by it to a like deduction from his own share. The answer to that seems to be, that even if the circumstances were identical, the advance might be chargeable against the share of *Thomas*, though not against *Ann's* children; and that to found an inquiry on such a point (which is the only way in which effect could be given to it) there should be some suggestion as to it in the answer. *Primâ facie*, what *Thomas*, an adult, did with his eyes open binds him, and not the less because his sister at the same time did a corresponding act, which did not bind her children; as he must, of course, have known. If proof were required of that, the mention of a covenant for indemnity would go far to supply it. On the face of the transaction the adult male's act was not made conditional on the submission by the unrepresented parties to what their mother purported to agree to on their behalf; and I cannot infer that one was conditional on the other without even a suggestion in the pleadings that it was so.

I think, therefore, that I can, without the risk of doing injustice or deviating from the rules of the Court, make a decree such as I have suggested; the Defendants, of course, being liable to the £400, or whatever the amount of the deficiency of the share may be, to the extent of assets only. And I think, though I feel the hardship of it, that I must give the Plaintiffs the costs up to the hearing inclusive.

Solicitors for the Plaintiffs: Messrs. *Young, Maples, & Co.*, agents for Messrs. *Marlow & Potter, Walsall.*

Solicitors for the Defendants: Messrs. *Deane & Chubb*, agents for Mr. *W. M. Eglinton, Birmingham.*

C. J. B.

1872

May 27;
June 3.

Ex parte MUTTON. *In re* COLE.

Bankruptcy—Execution—Unregistered Bill of Sale—Possession—Trustee.

M. was the holder of an unregistered bill of sale from *C.*, dated the 9th of January, 1869. On the 10th of March, 1871, the sheriff seized the goods of *C.* comprised in the bill of sale. On the 14th of March *M.* left a man on the premises of *C.*, jointly with the sheriff's officer. On the following day *C.* was adjudicated bankrupt, and *M.*, in ignorance of and after the adjudication, paid out the sheriff's officer and entered into possession; on a motion by *M.* that the trustee be ordered to pay to him the proceeds of the sale of the goods:—*Held*, that the bill of sale, being unregistered, was void as against the trustee; that no such possession was taken by *M.* as to relieve him from the effects of non-registration; that payment out of the sheriff's officer after the adjudication did not better his position, and that the proceeds of the sale of the goods belonged to the trustee, but charged with the repayment to *M.* of the moneys paid by him to the sheriff.

BY a bill of sale dated the 9th of January, 1869, *Cole*, a farmer, assigned all his household furniture, stock-in-trade, farming stock, implements of husbandry, and all other his personal estate and effects to *Mutton* to secure a present advance of £300, and any future advances which might be made by *Mutton*. This bill of sale was never registered in accordance with the provisions of the *Bills of Sale Act*. On the 10th of March, 1871, the Sheriff of *Cambridgeshire* seized the goods of *Cole* under three writs of *fi. fa.*, for an amount of £340. On the evening of the 14th of March *Mutton* went to *Cole's* house, and finding the sheriff's officer in possession requested him to withdraw, which he refused to do, and thereupon *Mutton* left a man in the house to look after his interests, who remained there all night. On the following day, the 15th of March, *Cole* filed a declaration of inability to pay his debts, and was adjudicated bankrupt about 10.30 A.M.; and about noon on the same day *Mutton*, in ignorance of the adjudication, went to *Cole's* house, paid out the sheriff, and took possession of the property; and about 2 P.M. on that day the bailiff of the County Court informed *Mutton* of the bankruptcy of *Cole*, and *Mutton* thereupon withdrew from possession, which was taken by the bailiff. On the 4th of April *Edward Bell* was appointed

trustee of *Cole's* estate. On the 26th of April *Mutton* commenced an action against the sheriff to recover back the moneys that he had paid in discharge of the three executions, which action was at the date of this appeal still pending. On the 3rd of May, at a meeting of creditors, it was resolved that the affairs of the bankrupt be liquidated by arrangement; and on the 9th of May an order was made in the County Court staying the proceedings in bankruptcy. On the 2nd of June *Mutton* gave notice to the trustee that he claimed the goods and chattels of *Cole*, and on the 16th of November, 1871, the Judge of the County Court at *Cambridge* made an order dismissing with costs an application by *Mutton* asking that the trustee of *Cole's* estate should be directed to deliver up to him the household furniture, plate, linen, china, goods, chattels, and effects belonging to *Cole*. On the 10th of December the appeal came on before the Chief Judge in *London*, and the case was ordered to stand over for the production of further evidence. On the 27th of May, when the appeal was heard, both *Cole* and *Mutton* were dead, but the usual steps had been taken to revive the proceedings.

Mutton stated in his affidavit that he paid out the sheriff's officer on the understanding that the sheriff would assign to him the goods and chattels of *Cole*, and this statement was confirmed by an affidavit of *Wisbey*, an auctioneer, but was contradicted by the person who was left in possession by the sheriff's officer.

Mr. *Little*, Q.C., and Mr. *Bush Cooper*, for *Cole's* representatives:—

Sect. 11 of the *Bankruptcy Act*, 1869, defines "commencement of bankruptcy," and sect. 15 enacts what property shall pass to the trustee. At the commencement of *Cole's* bankruptcy the goods and chattels assigned by the bill of sale were in the possession of the sheriff, and were not then vested in the bankrupt within the meaning of sect. 15: *Fletcher* v. *Manning* (1); *Ex parte Foss* (2). The *Bills of Sale Act* requires that possession be taken out of the debtor, and here it was taken out by the sheriff; and we having paid the sheriff out, ought to stand in his place.

(1) 12 M. & W. 571. (2) 2 De G. & J. 230.

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Mr. *De Gex*, Q.C., Mr. *Cockerell*, and Mr. *Brown*, for the trustee :—

The goods were in the apparent possession of the bankrupt within the meaning of the *Bills of Sale Act*: *Ex parte Lewis* (1); *Ex parte Hooman* (2); and no possession other than this was taken by the sheriff's officer. The cases of *Fletcher* v. *Manning* and *Ex parte Foss* were reputed ownership cases, and do not apply to cases within the *Bills of Sale Act*. Possession by the sheriff at the commencement of the bankruptcy does not exonerate an unregistered bill of sale holder from the effects of non-registration.

Mr. *Little*, in reply :—

The real point in this case is, whether possession by the sheriff at the commencement of the bankruptcy takes the goods out of the possession of the bankrupt, so as to render the "apparent possession" clause (3) in the *Bills of Sale Act* ineffectual. In this case the sheriff alone could remove the goods or bring an action of trover for them, and they cannot be said to be in the formal possession of the bankrupt, as no execution can be levied without the fact being known. As to our right to be paid the money we paid the sheriff in respect of the execution, it is clear that the trustee must be held to take the property subject to that payment.

SIR JAMES BACON, C.J. :—

This is an appeal from an order made by the Judge of the County Court of *Cambridgeshire*, dated the 16th of November, 1871, whereby he dismissed an application made to him by *Frederick Mutton* asking that the trustee of *Cole's* estate might be ordered to deliver to him certain goods and effects alleged to be included in a bill of sale executed to him by the bankrupt, and of which the trustee had taken possession under the bankruptcy.

(1) Law Rep. 6 Ch. 626.
(2) Ibid. 10 Eq. 63.
(3) The clause is as follows :— "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

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Upon the appeal coming on for hearing it appeared that, from the manner in which the case had been conducted in the County Court, the evidence then upon the file was not in such a shape that the hearing could be proceeded with, and this Court was required by both sides to permit the evidence to be perfected. That application having been acceded to, the requisite evidence has now been completed, and upon that evidence the argument before me has proceeded.

There is little if any difference between the parties as to the facts, which appear to be as follows:—[His Lordship stated them.] Now upon these facts it is insisted by the Appellant that, notwithstanding his having neglected for more than two years to register his bill of sale under the *Bills of Sale Act*, he is entitled to have restored to him the goods comprised in the assignment, and which have been taken possession of by the trustee in bankruptcy; or that, failing in that contention, he is entitled to have repaid to him the amount which he paid to the sheriff. Upon the first point the case is of considerable importance, having regard to the familiar practice which has existed, and which exists, of persons making secret assignments of their property, by means of which, when insolvency occurs, creditors frequently find the whole or the larger part of the debtor's visible effects are withdrawn from that equal distribution among them all which the law and common justice require. It was to check such practices that the *Bills of Sale Act* was passed —not to prevent a man from dealing, by sale or mortgage, for a present valuable and sufficient consideration, with that property of which he has a right to dispose, but to give to creditors the means of knowing, by the registration of such deeds, whether they were trusting a man with the apparent means of satisfying his engagements or whether they were running the risk of giving credit to a man who had given a preferential security to some other creditor; and the statute plainly enacts that a bill of sale not duly registered within twenty-one days from its execution shall be null and void as against execution creditors and trustees in bankruptcy, so far as regards any property of the debtor which shall be in his possession or apparent possession.

Well, then, how does this plain law apply to the facts of the present case? The bill of sale was indisputably void as against

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the execution creditors when the sheriff seized on the 10th of March; from that time the actual possession of the goods was in the sheriff, a possession with which no one could lawfully interfere, and in that lawful and exclusive possession they remained until after the adjudication. It is also clearly in evidence that they were in the apparent possession of the bankrupt up to and after that period. When it is said that *Mutton* took possession by leaving on the premises a man who slept there with the sheriff's bailiff on the night of the 14th of March, it must be obvious not only that this was no possession by *Mutton*, but that it did not in any manner affect the debtor's apparent possession; and if I could, as I cannot, admit the argument that *Mutton* did all he could to obtain possession, I am compelled to observe that even this is not so, for he might on the 14th of March have removed the obstacles to his taking possession by paying out the sheriff, and by so asserting and actually assuming possession by his own act and in his own person as to put an end to and exclude any real or apparent possession by *Cole*.

I must therefore conclude that up to and at the time of the bankruptcy the property in question was in the apparent possession of the bankrupt, and also that, subject to the discharge of the executions, it was in his actual possession. The adjudication in bankruptcy, however, effected an important change in other respects. From that moment the right to the property became vested in the trustee; he could not, indeed, regain the property without satisfying the executions, but subject to that payment the whole of the property then in *custodia legis* was absolutely his, and it was not competent to *Mutton* or to any other person to deprive him of this right.

It is obvious that *Mutton's* motive in paying out the sheriff was with the intention of thereby improving his own title under the bill of sale; but the bill of sale was wholly void as against the sheriff, and no payment made after the bankruptcy could have the effect of tacking the void security to the living active execution, and giving to the person who paid out the execution any greater right than the sheriff had, which right was simply to receive the amount of the levy. So far, therefore, as regards the first point raised upon this appeal, I am of opinion that the order cannot be

disturbed. There remains to be considered the second point, to which I have no reason to think that the attention of the learned County Court Judge was particularly directed, or that if it had been urged upon him he would not have made such order as he thought applicable to this part of the case.

The whole subject is now before the Court, and it is desired by both parties that an order should be now made which shall comprehend the entirety of the original application, as it would be an useless waste of time and expense to refer it back to the County Court. I cannot but think that the Appellant is entitled to relief in this respect. The payment by *Mutton* to the sheriff was no doubt gratuitous, but it has had the effect of discharging debts which must otherwise have been borne by the bankrupt's estate. I am willing to believe that it was made under a misapprehension, but I cannot possibly believe that it was *Mutton's* intention to make a present of £340 to the bankrupt's estate. No objection has been made on the part of the trustee to the items composing the sum paid, nor have I any reason to doubt their accuracy.

I think, therefore, that the trustee ought now to be ordered to pay to the Appellant, out of the proceeds of the goods possessed by him, the sum of £340. Inasmuch as I do not disturb or vary the order appealed from, but, on the contrary, concur in the decision of the Judge of the County Court, although I think it right now to add the direction I have given, the Appellant must pay the costs of the appeal.

Solicitors: Messrs. *Field, Roscoe, & Co.*, agents for Mr. *Foster, Cambridge;* Messrs. *Neal & Philpot.*

M. R.

1872

March 18, 19; *April* 17; *May* 4.

CORNISH *v.* CLARK.

[1869 C. 263.]

*Voluntary Settlement—Pecuniary Gifts—*13 *Eliz. c.* 5*—Creditors' Suit—Consideration.*

20 Ch D 391

A distribution by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts:—

Held void as against creditors under the 13 Eliz. c. 5, the Court being satisfied on the evidence that the children were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention.

THIS suit was instituted by the Plaintiffs on behalf of themselves and all other the creditors of *James Clark* the elder against the said *James Clark* the elder and his children, as Defendants, to set aside certain gifts made by *James Clark* the elder in favour of his children, as being void against creditors under the statute of 13 Eliz. c. 5. The said *James Clark* the elder died pending the suit.

At the end of 1867 *James Clark* the elder, who carried on the business of a machine man, or the owner of steam threshing machines, which he let out for hire, was indebted to the Plaintiffs, who were agricultural machine makers, in the sum of £350 on a balance of account.

At that time his property consisted of his stock-in-trade, comprising three steam threshing machines, valued at about £200 each, £300 deposited in a local bank, and a mortgage debt of £350.

On the 13th of June, 1868, *James Clark* the elder, who had nine children, gave a threshing machine to each of his three sons—*James Clark* the younger, *Mark Clark*, and *William Clark*; and by three several memorandums of agreement of that date, each of the said three sons agreed to pay to the father, in consideration of the said gift, an annuity of £20 during his life.

On the 7th of November, 1868, *James Clark* the elder divided

the sum of £300 in the bank among his six daughters; and by an instrument dated the 12th of November, 1868, he assigned the mortgage debt of £350 to trustees, upon trust to divide the same among his said six daughters and the children of a deceased daughter.

The Plaintiffs delivered their bill for the amount due to them on the 21st of May, 1868; and, after repeated applications for payment, they (not being aware that *James Clark* the elder had divested himself of his property) commenced an action against him. The action was undefended, and, on the 13th of April, 1869, they recovered judgment for £378 for their debt and costs. They issued a writ of *fi. fa.* upon the said judgment; but, in consequence of the said machines being claimed by the sons, they only recovered £16.

The Plaintiffs charged that the machines were not made over to the Defendants, *James Clark* the younger, *Mark Clark*, and *William Clark*, for the valuable consideration of the annuities, and *bonâ fide*, as the Defendants alleged, but for the purpose of delaying, hindering, and defrauding the Plaintiffs and the other creditors of *James Clark* the elder; and that the annuities were a very inadequate consideration for the said machines.

The Plaintiffs further charged that the payments of £50 to each of the daughters, and the settlement of the said sum of £350, were not made upon any good consideration or *bonâ fide*, but for the same purpose and with the full knowledge of the Defendants, and that the said gifts and assurances were fraudulent and void against the Plaintiffs and the other creditors of *James Clark* the elder, and prayed a declaration accordingly, and consequential relief.

It appeared from the evidence that *James Clark* the elder was, at the time of the transactions complained of, in a very weak state of health and of mind, and shortly after the suit was instituted he became incapable of attending to his own affairs, and died intestate four months after the bill was filed.

The Defendants to the suit were the said three sons of *James Clark* the elder, the daughters and their husbands, the children of the deceased daughter, and the trustee of the settlement of the 12th of November, 1868.

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The defence set up by his sons and daughters was in substance as follows: That the gifts by *James Clark* the elder to his sons were for valuable consideration, and that all the transactions impeached were *bonâ fide*, and not made with any intention of defeating or delaying the Plaintiffs or other creditors, but with the object of distributing the property of the donor among his children and grandchildren during his lifetime, instead of leaving it by will, and that they respectively were not aware, when they were parties to the several gifts and assurances in question, that *James Clark* the elder had no other means of meeting the claims of his creditors.

The evidence in the case, which was conflicting, sufficiently appears from the judgment.

Mr. *Southgate*, Q.C., and Mr. *Begg*, for the Plaintiffs:—

The evidence in this case fully supports the Plaintiffs' claim to have the gifts and assurances complained of set aside as fraudulent against creditors and within the scope of the statute 13 Eliz. c. 5: *Reese Silver Mining Company* v. *Atwell* (1). Admitting that it was not the object of *James Clark* the elder to defraud his creditors, still if such was the effect of the transactions they cannot be sustained. Besides, the children who took an interest under these gifts must have been well aware of the effect of this distribution of their father's property as regards the creditors.

The consideration of the annuities in respect of which the machines were made over to the three sons cannot prevent the operation of the statute as regards the gift in their favour: *Bott* v. *Smith* (2); *Mathews* v. *Feaver* (3). The transactions cannot be supported, and we submit that these gifts must be declared void as against creditors.

Mr. *Fischer*, Q.C., and Mr. *Martineau*, for the three sons of *James Clark* the elder:—

The arrangement under which the machines were transferred to these three Defendants was a matter of bargain and not of bounty. The evidence shews that it was done without any intention to

(1) Law Rep. 7 Eq. 347. (2) 21 Beav. 511.
(3) 1 Cox, 278.

defraud, delay, or hinder any creditors, for at that time the father was solvent. In *Bayspoole* v. *Collins* (1) very slight consideration was held sufficient to support a settlement under the statute 27 Eliz. c. 4, as against a subsequent mortgagee, and the same principle would apply whether an alleged voluntary settlement is impeached by a purchaser or a creditor.

In *Moore* v. *Crofton* (2) Sir *E. Sugden* observed that the Court, in executing a contract for valuable consideration, will not weigh in very nice scales the amount of the consideration where it has been reduced fairly by reason of the relationship of the parties.

Here there could have been no inadequacy of consideration, for the tables shew that an annuity for the life of the father could have been bought for £164, and the estimated value of each machine was £200.

Further, unless a debtor is indebted to the extent of insolvency the Court will not set aside a voluntary settlement on the ground of insolvency: *Thompson* v. *Webster* (3). In *Copis* v. *Middleton* (4), where an insolvent had sold his property for valuable consideration (the adequacy of which was disputed) to his nephew a month before his death, the Court refused to set the sale aside as being void as against creditors, because the vendor did not know of his own insolvency.

We submit that the transaction, being *bonâ fide* and for valuable consideration, cannot fairly be impeached as against the sons, and that the Court will not set it aside as against them by connecting it with the subsequent arrangement with the other children: *Harman* v. *Richards* (5).

Mr. *Cutler*, for the daughters, contended that even if the settlement of the 12th of November, 1868, could be set aside, the statute could not apply to the pecuniary gifts of £50 to each of the daughters. There was no case in which it had been so held.

Mr. *Southgate*, in reply:—

I admit that if the transactions in question were matters of bargain and not of bounty, and if they were conducted *bonâ*

(1) Law Rep. 6 Ch. 228.
(2) 3 J. & Lat. 438, 443.
(3) 4 Drew. 628; 4 De G. & J. 600.
(4) 2 Madd. 410.
(5) 10 Hare, 81.

5 Jur. N.S. 1185, 921

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fide, the Court could not set them aside, but the evidence here is quite the other way. With regard to consideration, two classes of cases have been confounded, for the Court does not apply so strict a rule in cases like *Ford* v. *Stuart* (1), under 27 Eliz. c. 4, as to cases like the present, under 13 Eliz. c. 5. *Thompson* v. *Webster* (2), relied on by the other side, is not applicable, for it is clear that the sons of *James Clark* the elder were aware of their father's debts not being paid. The gifts in money to the daughters are void as well as the settlement: *Barrack* v. *M'Culloch* (3). I submit that the Defendants have failed in their contention, and that the Plaintiffs are entitled to a decree.

April 17. LORD ROMILLY, M.R.:—

This is a suit instituted for the purpose of having certain transactions between *James Clark* the elder, deceased, and his children declared to be void as against his creditors under the 13 Eliz. c. 5.

[His Lordship then stated the facts of the case.]

When this case was first opened to me I did not sufficiently appreciate the condition of *James Clark* the elder and the conduct of his children. Having regard to the words of the statute, I was looking out for the marks of fraud on the part of the donor or settlor, and I was met by the counsel for the Defendants by a series of facts shewing the repeated applications *James Clark* the elder made for the Plaintiff's bill, and the repeated expressions introduced by *James Clark* the elder into his will, and in other ways, of his intention to pay the Plaintiff's bill as well as all his debts.

A careful consideration of the case, and an attentive perusal of the evidence, has brought me to the conclusion that the distribution of the father's property amongst his children was the act of his children, and that though the father assented to it, and even assuming that he had not the primary intention by so doing of defeating his creditors, still that the children who took advantage of his state to effect that object cannot profit by it.

No doubt the settlement of his affairs while alive was very fit

(1) 15 Beav. 493. (2) 4 Drew. 628; 4 De G. & J. 600.
(3) 3 K. & J. 110.

and proper. It would save the expense of a will, and of probate and legacy duty, and every one must admit that the distribution he made of his property, whether it proceeded from himself or from his family, was fair and equitable so far as they were concerned. The only defect of it was, that it did not provide for the claims of his creditors. I look on the various gifts I have stated as forming part of one whole connected plan, and I am of opinion that the statute of 13 Eliz. c. 5 was passed to meet and counteract this particular evil by which the property of the debtor was removed out of the reach of the creditors. And I am of opinion that the acts of settlor or donor are equally obnoxious to the provisions of the statute, whether they proceed from himself alone, or whether they are instigated by others. In this case I think the sons and daughters all knew the position of their father's health and circumstances, and that the object was to obtain a fair distribution of their father's property without any regard to the claims of his creditors. I think it of no moment in such matters whether the parting with the goods is by voluntary settlement or by gift, whether it is in anticipation of death or of bankruptcy, or whether it is by the free will of the donor, or whether it is at the instance of the donees. In this case I am inclined to think it was at the instance of the donees; but I think it equally invalid having regard to the scope and object of the statute.

I think also that the consideration of the annuity of £20 does not render the transaction valid. No doubt in such a case, whether mentioned or not, the children would support their parent. I should not have doubted that it was an implied, if not an expressed condition, and the introduction of this covenant to pay the annuity of £20 appears to me to be merely formal, and not to operate upon the transaction. I think the whole bad as against creditors, but merely as against them, and that the donees must rateably contribute to pay the debt and the costs of the suit.

May 5. The case was spoken to on minutes, and the form of decree was settled by the Court.

MINUTES:—Declare that the gifts by *James Clark* the elder of the three steam threshing machines to the Defendants *James Clark* the younger, *Mark Clark*, and

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William Clark respectively, and of the said several sums of £50 to the Defendants [the daughters], and the indenture of setlement dated the 12th of November, 1868, were and are respectively fraudulent and void as against the Plaintiffs and all other the creditors against the estate of the said *James Clark* the elder, deceased: and declare that as between the Defendants the funeral and administration expenses and debts of the intestate, *James Clark* the elder, and the Plaintiffs' costs of the suit, ought to be borne and paid by the Defendants, other than the Defendant the trustee of the said indenture of settlement, rateably in proportion to the amount or value of the said several gifts to them respectively, and of their respective interests under the said settlement; and this declaration to be without prejudice to the right of the Plaintiffs to enforce this decree against all or any of the Defendants, and against all or any part of the estate of the intestate, as they may be advised. Order that the proceeds of the sale of one of the machines (which had been sold), and the said several sums of £50, be paid into Court, and that the following accounts and inquiries be taken [the usual accounts and inquiries in a creditors' suit]. Liberty to apply at Chambers for a sale of the machines remaining unsold: the Defendants other than the trustee to pay the Plaintiffs' costs up to and including the hearing: the trustee to retain his costs out of the surplus (if any) of the fund under the settlement. Reserve further consideration as to contribution of Defendants *inter se*, and costs not before provided for.

Solicitor for the Plaintiff: Mr. *C. M. Stretton.*

Solicitors for the Defendants: Messrs. *White & Sons,* agents for Mr. *R. Cates, Fakenham;* Mr. *W. G. Brighten,* agent for Mr. *J. Stanley, Norwich.*

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KENT *v.* RILEY.

[1871 K. 19.]

Voluntary Settlement—Defeating Creditors—13 *Eliz. c.* 5.

In the absence of actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid.

THIS was a suit by the assignee in bankruptcy of *William Felix Riley,* instituted for the purpose of setting aside a post-nuptial settlement made by him under the following circumstances:—

In February, 1868, *William Felix Riley* was entitled in fee

simple to a freehold house in *Albemarle Street*, subject to several mortgages thereon, one of which was in favour of Colonel *Leach*. He was also entitled to some personal property, the value of which did not exceed £150. He had incurred simple contract debts to the amount of about £760, which he was unable to pay, and he applied to his solicitor, Mr. *Francis Leach*, the brother of Colonel *Leach*, and an old friend of *Riley's* family, to procure him an advance of money. Mr. *Leach* replied to the application by a letter dated the 14th of February, 1868, in the following terms:—

"I am extremely sorry to read your letter received to-day. You do quite right to ascertain exactly the extent of your liabilities. The sum you mention as owing indeed exceeds what I could have thought. Before I take any step I should wish to see you, because I think the time has come at which you ought to settle the residue of your property on your wife and children; and I cannot be a party to your raising any more money without your doing them this justice. If you will undertake to make the settlement I will see what can be done towards relieving you from your present difficulties. No creditor is, I should think, likely to press you; but should any come to me, I can but say that you propose to make arrangements for payment."

Mr. *Leach* subsequently had an interview with *William Felix Riley*, at which it was agreed that the former should procure from his brother, Colonel *Leach*, a further advance of £550 on the security of the house in *Albemarle Street*, and that the Defendant should convey the equity of redemption to trustees upon trust to sell, and out of the proceeds pay off the mortgages, and then to pay a sum of £400 to *William Felix Riley;* and that the residue of the proceeds of sale should be settled upon trusts, partly for the benefit of his wife and children and partly for his own benefit.

Accordingly Colonel *Leach* advanced £550 on the security of a mortgage of the property, and by an indenture dated the 16th of March, 1868, *William Felix Riley* conveyed the same property (subject to mortgages for sums amounting in the whole to £3750) to trustees upon trust to sell, pay off the mortgage debts, and pay the sum of £400 to *William Felix Riley;* and to stand possessed of the residue of the proceeds of sale upon the trusts declared by an indenture of even date. The trusts so declared were for invest-

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ment and payment out of the income of an annuity of £40 a year for the maintenance of the wife and children of *William Felix Riley*, or (in the discretion of the trustees) any one or more of them, and subject thereto for payment of the income to *William Felix Riley* during his life, and after his death for payment of the income upon the same trusts as were declared of the annuity of £40; and after the death of the survivor of Mr. and Mrs. *Riley* for the payment or application of *corpus* and income for the benefit of their children.

The property comprised in the settlement was sold in December, 1868, and after payment of the mortgage debts and the sum of £400 to *William Felix Riley*, there remained a surplus which was invested in £700 5 per Cent. Debenture Stock of the *South Eastern Railway Company*, upon the trusts of the settlement of the 16th of March, 1868.

A considerable part of the sum of £550 advanced by Colonel *Leach* was applied in payment of debts due by *William Felix Riley;* but the sum of £400, which arose from the sale, was applied by him for other purposes, and debts to the amount of upwards of £360, owing by him on the 16th of March, 1868, still remained unpaid.

On the 18th of March, 1869, *William Felix Riley* was adjudicated a bankrupt on his own petition, and the Plaintiff was appointed creditors' assignee in the bankruptcy; and on the 3rd of June, 1871, the bill in this suit was filed to set aside the settlement of the 16th of March, 1868, as being fraudulent under the statute 13 Eliz. c. 5.

Mr. *Hinde Palmer*, Q.C., and Mr. *Boyle*, for the Plaintiff, relied on the following observations in the judgment of Lord *Westbury* in *Spirett* v. *Willows* (1): "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. . . . . It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the

(1) 3 D. J. & S. 293, 302.

time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation, or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defrauded." The cases of *Freeman* v. *Pope* (1) and *Bott* v. *Smith* (2) shewed that a deed might be set aside though consideration was given for it.

Sir *R. Baggallay*, Q.C., and Mr. *Grenside*, for the Defendants:—

A settlement is only void under the statute when it is made with intent to delay, hinder, or defraud creditors. If a settlement is made voluntarily, and the necessary effect of the settlement is to defeat, delay, or hinder creditors, then the intent will be presumed; but if such be not the necessary effect of the settlement, then some proof must be given of the actual intention. Here the necessary effect of the deed was not to defeat, delay, or hinder creditors; for by means of it funds were to be raised which would have been amply sufficient for payment of all the settlor's debts. Neither is there any evidence of actual intent to defeat, delay, or hinder creditors; on the contrary, the letter of Mr. *Leach* shews that the primary object was to raise sufficient funds for the payment of debts. There is sufficient consideration to support this settlement, for a further advance of £550 was obtained from a prior mortgagee, on the understanding that this settlement should be made.

There have been great fluctuations in the opinion of Judges as to what must be proved in order to shew a fraudulent intent. In *Walker* v. *Burrows* (3) it was held sufficient to shew that a voluntary settlor was indebted, at the time of making the settlement, to some person whose debt remained unpaid; but that is no longer law. In *Skarf* v. *Soulby* (4) it was laid down that the existence of property at the time of the settlement, not included in it, and ample for the payment of debts then due, would negative the fraudulent intention. The *dicta* of Lord *Westbury* in *Spirett* v. *Willows* (5) are inconsistent with this, but they were not necessary for the decision of that case, and have been disapproved of in

(1) Law Rep. 5 Ch. 538.
(2) 21 Beav. 511.
(3) 1 Atk. 93.
(4) 1 Mac. & G. 364, 375.
(5) 3 D. J. & S. 293.

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Freeman v. *Pope* (1). If value is given for the settlement, fraudulent intent must be proved: *Holmes* v. *Penney* (2). That the consideration here given was sufficient is shewn by the cases of *Thompson* v. *Webster* (3); *Bayspoole* v. *Collins* (4).

Mr. *Hinde Palmer*, in reply:—

I admit, on the one hand, that the mere fact of a man owing a few debts at the time he makes a voluntary settlement will not afford sufficient ground for setting aside the deed. On the other hand, it is not necessary to prove actual insolvency at the date of the deed. But if a man, being largely indebted, makes a voluntary settlement, and shortly afterwards becomes insolvent, the deed can not be supported: *Crossley* v. *Elworthy* (5). It is true that some of the *dicta* in *Spirett* v. *Willows* (6) were criticised in *Freeman* v. *Pope*; but after making every allowance, there still remains enough of that judgment unimpeached to afford sufficient ground for deciding in favour of the Plaintiff in this case. As for the alleged agreement or understanding upon the faith of which the settlement was made, it was an agreement between the Plaintiff and his own solicitor, and can no more support the settlement than the mere desire on the part of the settlor to provide for his family.

June 24. LORD ROMILLY, M.R., said that the Plaintiff sought to set aside a deed on the ground that it was executed with intent to defeat, delay, or hinder creditors. As had often been observed in these cases, it was impossible to penetrate into a man's mind and ascertain what his intentions were; the facts only could be looked at in order to ascertain what inference could fairly be drawn as to the intention of the settlor. Looking at the facts proved in this case, and particularly at the letter of Mr. *Leach*, of the 14th of February, 1868, it appeared to his Lordship impossible to come to the conclusion that this settlement was made with the intent to defeat, delay, or hinder creditors; on the contrary, the conclusion he arrived at was that the object of the settlor was to pay his

(1) Law Rep. 5 Ch. 538.
(2) 3 K. & J. 90.
(3) 4 De G. & J. 600; affirmed in D. P. 7 Jur. (N.S.) 531.
(4) Law Rep. 6 Ch. 228.
(5) Ibid. 12 Eq. 158.
(6) 3 D. J. & S. 293.

creditors, and for that purpose to raise sufficient money by mortgage of his property, and then to make a settlement of the residue only. The settlement, therefore, could not be set aside; but as the suit had been occasioned by the improper conduct of the settlor in not paying his debts by means of the funds raised, the bill would be dismissed without costs; but the trustees of the settlement might take their costs out of the settled funds.

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Solicitors: Messrs. *Saffery & Huntley*; Mr. *F. Leach.*

WARD *v.* BOOTH.

[1871 W. 57.]

M. R. 1872 *June* 27

Sequestration—Suit to enforce—Lien—Purchaser with Notice—Debtor out of Jurisdiction—Practice—Pleading—Discharge of Order—Acquiring New Title—Amendment.

The title of a person claiming under a writ of sequestration issued by the Court of Chancery prevails over that of a mortgagee under a mortgage for value made in order to avoid the effect of the writ, and with full knowledge on the part of the mortgagee of all the circumstances.

An order for payment into Court of a fund in the hands of a stakeholder in this country may be made in a suit in which one of two parties (each of whom claims the fund under a person residing abroad) is Plaintiff, and the other a Defendant, although the person residing abroad may not be made effectually a party to the suit; but

Semble, an order will not be made for payment of the fund out of Court until such person has been served.

In a suit of *W.* v. *C.* a writ of sequestration issued against *C.* was irregularly discharged without the knowledge of *W.*, and at the instance of *M.*, acting on behalf of *C.* *W.* afterwards filed a bill to enforce a later writ against property to which *C.* had become entitled subsequently to the discharge of the writ, and which was claimed by *M.* under a mortgage by *C.* After filing the bill *W.*, for the first time, became aware of the existence of the order discharging the writ, and procured such order to be itself discharged, and amended his bill, relying on the first writ:—

Held, that he had sufficient title at the time of filing the bill to enable him to maintain the suit.

THIS was a suit by *Thomas Ward* against *William Beattie Booth* and *Eliza Elizabeth* his wife, *John Meyer*, and *Augusta Johanna Cornwall*, widow (when she should come within the jurisdiction).

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By the decree, dated the 19th of November, 1860, made in a suit of *Ward* v. *Cornwall*, in which *Thomas Ward* was Plaintiff and *Augusta Johanna Cornwall* and others Defendants, Mrs. *Cornwall* was ordered to transfer into the name of the Plaintiff *Thomas Ward* two sums of £2197 19*s.* 8*d.* 3 per Cent. Annuities, and £1089 12*s.* 3¼ per Cent. Annuities, and to pay to him two sums of £2934 18*s.* 11*d.* and £337 0*s.* 5*d.* cash. Mrs. *Cornwall* failed to comply with the order, and went out of the jurisdiction in order to avoid service of any process; and in January, 1861, an order was made for the issue of a commission of sequestration to sequester her personal estate and the rents, issues, and profits of her real estate until she should comply with the order; and a commission of sequestration was duly issued accordingly.

Throughout these proceedings one *Berry* had acted as the Plaintiff's solicitor. In May, 1862, the Plaintiff obtained the usual order to change his solicitor, and accordingly new solicitors afterwards appeared on the record and acted for him.

In 1866 Mrs. *Cornwall* became, on the death of her mother, entitled to a copyhold tenement (of what value did not appear), and entered into negotiations for the sale thereof, but found difficulty in making a title by reason of the existence of the sequestration. The Defendant *John Meyer*, who was her brother-in-law, thereupon at her request entered into negotiations with *Berry* (who, as *Meyer* alleged, professed to be, and was regarded by him as still being, the Plaintiff's solicitor) for the discharge of the sequestration; and accordingly *Berry*, in consideration of the payment to him of £100 and £3 3*s.* for costs, procured an order to be made on the 14th of February, 1867, discharging the order of January, 1861, and the commission of sequestration.

In February, 1870, Mrs. *Cornwall*, as one of the next of kin of *John Henry Frolich*, became entitled to a share of his personal estate, amounting to about £860; and the Plaintiff, becoming aware of this in April, 1870, caused notice to be served on the Defendants *William Beattie Booth* and *Elizabeth Eliza* his wife (the latter of whom was the legal personal representative of *Frolich*), requiring them not to pay to Mrs. *Cornwall* her share of the estate, inasmuch as the Plaintiff claimed a lien thereon to answer the debt recovered by the decree of the 19th of November, 1860.

The notice stated (what the then solicitor of the Plaintiff believed to be the fact) that on the 22nd of December, 1860, an order was made for the issue of an attachment against Mrs. *Cornwall*, but that, in consequence of her having gone beyond the jurisdiction, the order was not served.

On the 5th of May, 1870, an order was made in the suit of *Ward* v. *Cornwall* for the issue of a commission of sequestration against Mrs. *Cornwall*.

On the 14th of May, 1870, the Defendant *Meyer*, in ignorance of the last-mentioned order, and being advised that the Plaintiff had no lien on Mrs. *Cornwall's* share of the estate of *Frolich*, advanced to her the sum of £800 on the security of a mortgage thereof which was executed by Mrs. *Cornwall* on the same day at *Boulogne*. Notice of this mortgage was served on Mr. and Mrs. *Booth* on the 16th of May.

The original bill in this suit was filed in March, 1871. It made no reference to the order of January, 1861, but set out the order of the 5th of May, 1870, and alleged that the mortgage to *Meyer* was not made for valuable consideration, but was executed for the purpose of defeating and delaying the Plaintiff and other creditors of Mrs. *Cornwall;* and further, that *Meyer*, when he took the said mortgage, had full notice of the Plaintiff's debt and of the sequestration; and it prayed for a declaration that the Plaintiff had a lien upon and was entitled to have paid to him or to receive Mrs. *Cornwall's* share of the personal estate of *Frolich*, in or towards satisfaction of the sums ordered by the decree in *Ward* v. *Cornwall* to be transferred and paid to him; for an order for payment of the share to the Plaintiff, and for an injunction to restrain Mr. and Mrs. *Booth* from paying the same to *Meyer*.

The Defendant *Meyer* put in an answer, stating the facts as to the issue of the commission of sequestration in January, 1861, and the discharge thereof by the order of the 14th of February, 1867. The Plaintiff, being thus for the first time made acquainted with these facts, procured the orders of the 14th of February, 1867, and the 5th of May, 1870, to be discharged; and afterwards amended his bill, and by such amended bill rested his title to relief on the order of January, 1861, and the commission of sequestration issued thereunder. By his answer to the amended bill the Defendant

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Meyer raised the objection that the Plaintiff's title (if any) had arisen subsequently to the filing of the original bill.

The cause now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Townsend*, for the Plaintiff:—

Meyer was bound to know that *Berry* was no longer the Plaintiff's solicitor, but independently of that, he must have known that a solicitor had no authority to consent to discharge a writ to enforce payment of between £4000 and £5000 in consideration of £100, a sum given to enable Mrs. *Cornwall* to sell a copyhold estate which must be presumed to have been of greater value The order discharging the original writ, therefore, cannot be relied on. The operation of a writ of sequestration extends to choses in action: *Wilson* v. *Metcalfe* (1). The mortgage to *Meyer*, even if for valuable consideration, was not made *bonâ fide*, and therefore cannot prevail against the Plaintiff's right: *Twyne's Case* (2); *Bott* v. *Smith* (3).

Mr. *Roxburgh*, Q.C., and Mr. *Seeley*, for Mr. and Mrs. *Booth*, submitted to act as the Court should direct.

Sir *R. Baggallay*, Q.C., and Mr. *C. T. Simpson*, for *Meyer*:—

First: Mrs. *Cornwall* is out of the jurisdiction, and has not been served; and no order can be made in her absence: *Browne* v. *Blount* (4).

Secondly: At the time when the original bill was filed the Plaintiff had no title to sue. The order of the 14th of February, 1867, although irregularly obtained, was good until discharged: *Russell* v. *East Anglian Railway Company* (5); *Fennings* v. *Humphery* (6). The discharge was not obtained until after the filing of the original bill, and the Plaintiff cannot set up a subsequent title by amendment: *Attorney-General* v. *Corporation of Avon* (7). It may be said that the order of discharge operated to reinstate the order of January, 1861, as, if the order of February, 1867, had never been made; but that is not enough. In *Low* v. *Rout-*

(1) 1 Beav. 263.
(2) 1 Sm. L. C. 1.
(3) 21 Beav. 511.
(4) 2 Russ. & My. 83.
(5) 3 Mac. & G. 104.
(6) 4 Beav. 1.
(7) 3 D. J. & S. 637.

ledge (1) the Plaintiff sued in respect of an infringement of his copyright; a demurrer was filed to his bill in consequence of its appearing on the face of the bill that he had not correctly registered his work at *Stationers' Hall;* but though the error did not affect the copyright, and though the entry on the register could be corrected, and though, after such correction, the Plaintiff would have been able to sue, still it was held that that would not enable him to maintain the bill already filed, and leave to amend was refused.

Thirdly: A writ of sequestration does not of itself create a charge on a fund such as is in question here: *Francklyn* v. *Colhoun* (2); *Johnson* v. *Chippindall* (3); *Fenton* v. *Lowther* (4); *McCarthy* v. *Goold* (5); *Crispin* v. *Cumano* (6). The case relied on by the Plaintiff, *Wilson* v. *Metcalfe* (7), shews that this proposition is correct, and that a lien must be created, if at all, by some subsequent proceeding, as by obtaining a charging order or filing a bill. Such lien will take effect only from the commencement of the subsequent proceedings. In the present case the mortgage to *Meyer* was made before the bill was filed, and consequently before any lien could be created.

Fourthly: The mortgage to *Meyer* was made for valuable consideration, and cannot be set aside merely on the ground that it was made to defeat the Plaintiff's rights: *Nortcliffe* v. *Warburton* (8); *Hale* v. *Saloon Omnibus Company* (9).

LORD ROMILLY, M.R.:—

On some part of this case I entertain no doubt. In the first place, I consider this to be a fund in the hands of the legal personal representative of Mr. *Frolich*. There are two claimants of the fund, one the Plaintiff, who claims it under a sequestration; the other, the Defendant Mr. *Meyer*, who claims it under a mortgage. I am of opinion that in that state of circumstances this suit is a proper proceeding to enable this Court to determine which of

(1) 33 L. J. (Ch.) 717.
(2) 3 Sw. 276.
(3) 2 Sim. 55.
(4) 1 Cox, 315.
(5) 1 B. & B. 387.
(6) Law Rep. 1 P. & D. 622.
(7) 1 Beav. 263.
(8) 4 D. F. & J. 449.
(9) 4 Drew. 492.

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them is entitled to the fund. As to whether, after that is determined, any further proceedings may be necessary or not, I will hear Mr. *Southgate* if he desires it. Nobody has at present established a right to the fund; it must be paid into Court, Mr. and Mrs. *Booth* deducting their costs. I will state my answer to the objections raised by the Defendant *Meyer*. There is a sequestration obtained in the month of January, 1861. Since that time nothing has taken place but a series of attempts by the debtor colluding with her brother-in-law, Mr. *Meyer*, to prevent the sequestration from operating. They say the writ was not in force when the bill was filed, because an order had been made in 1867 to put an end to this writ of sequestration, and the bill was not filed till March, 1871, and the order putting an end to the writ was not discharged till the July after the filing of the bill. The answer is, the discharge of the order leaves the writ of sequestration in force from the issuing of it till the present moment. Mr. *Meyer* cannot derive any benefit from the temporary suspension of it, for he is the man who was a participator in a fraud for the purpose of getting rid of this sequestration, and who, at the request of his sister, in order to enable her to withdraw the copyhold property from the operation of the writ, applied to a person, who (as he was bound to know) was not the solicitor for the Plaintiff, and who gave that solicitor £100 and the costs of the order to induce him to consent to an order to discharge the writ, after which he comes forward and says there was no sequestration, for it was discharged by the order of February, 1867. That is, one of the suitors of this Court by means of a fraud induces this Court to make an improper order, and then sets up this improper order as valid till discharged, in order to enable him and his accomplice to take the property of another. The real Plaintiff knew nothing of this till July, 1871, after he had filed the bill, which was done in the full belief that the writ of sequestration was still in force, while in the meantime this Defendant tries to take advantage of this technical objection, by bribing an attorney to get rid of the original writ. It is impossible that a Court of Equity can listen to such an argument as that.

The Plaintiff is entitled to between £4000 and £5000 from the Defendant Mrs. *Cornwall*. She has gone out of the country, and

every species of device is resorted to in order to prevent this Court from enforcing its own decree. A writ of sequestration, however, is more powerful than a common writ, and if it be said that it is necessary to take some proceeding to enforce the writ against a *chose in action*, this is such a proceeding. Then Mr. *Meyer*, who has induced his sister to mortgage the property to him, comes forward and says that the person entitled to it is out of the jurisdiction, and nothing can be done in her absence. But as it is mortgaged up to its full value, she has really no interest in the fund at all. When it is paid into Court, however, notice will have to be given to her, and she may then come forward if she thinks fit. No valid claim, however, was created by the execution of a deed at *Boulogne* by Mrs. *Cornwall* in favour of her brother-in-law, who was aware of all the circumstances.

As to the cases, I think that *Francklyn* v. *Colhoun* (1) is strongly in favour of the Plaintiff's right so far as it goes, and all that is decided by *Johnson* v. *Chippindall* (2) is, that where you seek to touch a *chose in action* you must have the debtor from whom it is due a party to the cause. Here the debtors, that is, the legal personal representatives of *Frolich*, are parties; Mr. *Roxburgh* appears for them. And if Mr. *Meyer* had tried to get somebody to purchase this *chose in action* in ignorance of the facts, this Court would have granted an injunction to prevent such a thing from being done. I do not say, however, that if the fund had got into the hands of a purchaser for value without notice, the Plaintiff could have got it back again.

As the case is, I declare that the Plaintiff's charge has priority over that of the Defendant *Meyer*, and over any similar charge; Mr. *Roxburgh's* clients must pay the money into Court, deducting their costs, and the sequestrators will be entitled, in the first instance, to be paid what is due to them.

Solicitors: Messrs. *Hurford & Taylor;* Messrs. *Paterson, Sons, & Garner;* Messrs. *Johnston & Jackson.*

(1) 3 Sw. 276. (2) 2 Sim. 55.

V.-C. B.

1872

May 23, 24; *June* 12, 19, 20, 21.

15 Eq. 81.
9 Ch. 197

MOTION *v.* MOOJEN.

[1870 M. 71.]

Pleading—Bankrupt Plaintiff—Demurrer—Charges of Fraud—Costs of Suit.

An uncertificated bankrupt is incapable of suing in Chancery, though the bill charges fraud against all the Defendants, including amongst them the creditors' assignee.

Observations on demurring to a bill by an uncertificated bankrupt, charging personal fraud.

Bill dismissed, but, inasmuch as the charges of fraud (which had been answered) were held to have been sustained, without costs.

THE Plaintiff, *George Motion*, describing himself as a wine merchant, filed the bill against *Frederick Moojen*, *John Hay*, *Edwin Netterville Briggs*, and *Thomas Staunton*, alleging to the following effect.

In August, 1863, the Plaintiff and the Defendants *John Hay* and *Briggs* became partners in a distillery in *Albany Street*, known as "*Grimble & Co.*," which had been then recently purchased by *Robert Burdett* from *William*, a brother of *John Hay*, and by him agreed to be transferred to *Motion*.

In November, 1863, *W. Hay* filed a bill against *Burdett*, *Motion*, *J. Hay*, and *Briggs*, alleging that debts due to *W. Hay* had been collected by the firm; and in that suit a receiver of *W. Hay's* assets was appointed.

In January, 1864, *Motion* served on *J. Hay* a notice of his intention to exercise an option of purchase under the articles of partnership; and in the same month *J. Hay* filed a bill against *Motion* and *Briggs*, praying for a dissolution of the partnership.

In April, 1864, *Motion* filed a bill against *J. Hay* and *Briggs* with a similar object.

On the 30th of April, 1864, a decree was made in both *J. Hay's* and *Motion's* suits, that the partnership ought to be dissolved as from the 30th of April, 1864, and that the property and effects of the partnership should be sold as a going concern with the approbation of the Judge, and that each of the partners was to be at liberty to bid for and become the purchaser of the same; and a receiver was ordered to be appointed.

On the 9th of July, 1864, *Henry Marston*, a nominee (as alleged) of *J. Hay*, was appointed receiver.

Up to this date the Defendant *Moojen* had acted as the solicitor of the Plaintiff *Motion*. He was a brother-in-law of *Briggs*, and acted throughout also as his solicitor. *Motion* was desirous that Mr. *Quilter* should be appointed receiver, but failed (as he alleged) by reason of many of the statements in the affidavits in support of *Marston* remaining unanswered. *Motion* (as he alleged) called *Moojen's* attention to these statements, but *Moojen* advised him it was not necessary to answer them. This advice (as alleged) was given improperly, and with the design, which about that time was formed by *J. Hay* and *Briggs*, with the privity of *Moojen*, to acquire *Motion's* share in the business at an undervalue.

On the 4th of June, 1864, an order was obtained in *W. Hay's* suit for the payment by *Burdett*, *Motion*, and *Briggs* of a sum of £6000; and on the 25th of June, 1864, a two-day order for payment was obtained against the three, and that personal service on *Moojen* should be good against them. Shortly afterwards *W. Hay* caused an attachment to be issued against *Motion* alone. *Moojen* (as alleged) falsely represented to *Motion* that the orders had been made against him (*Motion*) alone, and advised him (as alleged with the above design) to keep out of the way. *Motion* did so for a time, but, returning to his residence at *Stoke Newington*, he was there, in about March, 1865, arrested and committed to *White Cross Street* prison, where he remained until July, 1865.

During this time the receiver (as was alleged) had plenty of money in hand to pay this partnership debt.

Before the arrest, a solicitor, named *King*, was, at *Moojen's* suggestion, employed to act for the Plaintiff. He was afterwards removed by *Moojen*, and another solicitor, named *Oliver*, a nominee of *Moojen*, was appointed.

The carriage of the decree of April, 1864, was given to *J. Hay*, but he delayed the sale, and at length *Motion*, whilst in prison, instructed *Oliver*, against *Moojen's* wishes, to press on the sale, and *Oliver* went so far as to get the advertisements of sale approved in May, 1865; but on the 31st of May *Moojen* appeared suddenly before the Chief Clerk, and stated, as the fact was, that an adjudication of bankruptcy had that day been made against *Motion*. Thereupon the suits became defective, and all proceedings were suspended.

The petitioning creditor was *Burdett*, *Moojen* being interested in

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and finally becoming the sole owner of the debt. No notice of the petition, or of the intention to proceed to an adjudication, was ever, as *Motion* alleged, given to him.

Moojen then (as alleged) advised and persuaded *Motion* to let the bankruptcy go on, and *Motion*, submitting to the adjudication, was released from prison.

The creditors' assignee, who consented to act at *Moojen's* request, was *James Johnstone* the younger, and at the like request *John Robert Chidley* was appointed to act as solicitor; but when, upon the creditors expressing indignation at the conduct of the solicitor, *Johnstone* proposed to remove *Chidley*, he was himself removed by *Moojen*.

Thereupon a Mr. *Coxon*, an independent man, was appointed assignee, and in July, 1868, an order was made that *J. Hay* should conduct the sale of the partnership effects, and that neither he nor *Briggs* should be at liberty to bid, but in January, 1869, *Coxon* died, no sale having taken place.

Thereupon *Moojen*, *J. Hay*, and *Briggs* procured (as alleged) proof to be made in the bankruptcy by a Mr. *Maule*, a relative of *Briggs*, for a debt, he having (as alleged for the purpose) paid off a debt for which he was surety. By this means *Moojen*, *J. Hay*, and *Briggs* obtained a majority, and secured the appointment of *Staunton*, a friend of *Moojen*, as creditors' assignee.

On the 15th of April, 1869, *Staunton* entered into an agreement (to which *Motion* was not a party) with *Briggs* and *J. Hay*, that he, *Staunton*, should, subject to the approbation of the Judge, sell to *Briggs* and *J. Hay* his (*Staunton's*) interest in the property, at such amount as the Chief Clerk should fix as the value of such interest.

In June, 1869, *Marston*, the receiver, died.

Motion protested against the above agreement, but an order was, on the 15th of July, 1869, obtained in Chambers, directing that *J. Hay* and *Briggs* should pay to *Staunton* £13,025 3*s.* 1*d.* as the amount of *Motion's* share and interest in the partnership estate and effects; and, on the 21st of July, *Chidley* wrote to *Motion*, informing him that the order had been made.

The bill was filed on the 7th of April, 1870. It alleged that, immediately after the order of July, 1869, had been obtained,

Staunton, in concert with the other Defendants, called a dividend meeting of the creditors for the 4th of August, 1869. Before the meeting took place, the Plaintiff applied to Mr. Commissioner *Holroyd*, the Commissioner acting in the bankruptcy, "to cause an investigation to be made into the conduct and proceedings of *Staunton* in obtaining or consenting to the order; but the Commissioner refused the application, on the ground that he was in effect asked to rescind an order of the Court of Chancery, which he had no jurisdiction to interfere with." *Staunton*, however, had never applied for or obtained the sanction of the Court of Bankruptcy to his consenting to the order.

The bill prayed for a declaration that the order of the 15th of July, 1869, was obtained by fraud or misrepresentation on the part of the Defendants, and that the same was void and of no effect as against the Plaintiff, and for a declaration that the sale was fraudulent and void, and other relief.

No trace of the above application to the Commissioner appeared on the file of proceedings in bankruptcy.

Neither of the Defendants demurred, but they all answered the bill at great length.

The Defendant *Moojen* by his answer submitted that the Plaintiff was not entitled to any part of the relief prayed by the bill, and claimed the same benefit from that objection to the bill as he would have been entitled to if he had demurred.

The Defendant *Briggs* submitted that the Plaintiff, as an uncertificated bankrupt, had not any share or interest in the premises.

The Defendant *Staunton* craved the benefit of all the defences to the bill as if he had demurred or pleaded.

Both sides went into evidence, with the results appearing from His Honour's judgment.

The Plaintiff's evidence went to shew that his share was worth at least £20,000.

Mr. *Kay*, Q.C., and Mr. *Chitty*, for the Plaintiff:—

It is said that the Plaintiff is an uncertificated bankrupt, and unable to sue; but this is a case of fraud, in which the Court always has jurisdiction: *Mitford* on Pleading (1).

(1) 5th Ed. of 1792, p. 112.

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In *Troup* v. *Ricardo* (1), where there was a large surplus, and an issue was raised between the Plaintiff and the officers of the Insolvent Court, which that tribunal would have been (if still in existence) incompetent to try, the Plaintiff, though an insolvent debtor, was held entitled to sue in Chancery.

In *Wearing* v. *Ellis* (2) a release in full by all the creditors had been obtained by the insolvent, whose devisee the Plaintiff was.

If the jurisdiction be taken away from this Court, where is it vested? The Court of Bankruptcy has no power to set aside an order for sale.

Mr. *Miller*, Q.C., and Mr. *W. W. Cooper*, for the Defendant *Moojen*:—

The Plaintiff has no right to sue; upon this point the authorities are clear: *Smith* v. *Moffatt* (3); *Benfield* v. *Solomons* (4); *Payne* v. *Dicker* (5).

Further, *Moojen* was no party, otherwise than as solicitor, to the transactions complained of, and is an improper party to the suit; and upon the merits he merely advised his client for the best.

Other authorities on the jurisdiction question are, *Rochfort* v. *Battersby* (6); *Davis* v. *Snell* (7).

Mr. *Bristowe*, Q.C., and Mr. *Owen*, for the Defendant *J. Hay*.

Mr. *Amphlett*, Q.C., and Mr. *Marten*, for the Defendant *Briggs*:—

To the authorities already cited on the jurisdiction question may be added *Martin* v. *Powning* (8); *Phillips* v. *Furber* (9); *Stone* v. *Thomas* (10); *Hammond* v. *Attwood* (11); *Tudway* v. *Jones* (12).

As to laches: *Ex parte Banfield* (13); *Ex parte Sampson* (14); *Ex parte Sullivan* (15); *Ex parte Savin* (16); and especially with

(1) 34 L. J. (Ch.) 91; 10 Jur. (N.S.) 1161; 5 N. R. 62; 13 W. R. 147; 11 L. T. (N.S.) 399.
(2) 6 D. M. & G. 596.
(3) Law Rep. 1 Eq. 397.
(4) 9 Ves. 77.
(5) Law Rep. 6 Ch. 578.
(6) 2 H. L. C. 388.
(7) 28 Beav. 321.
(8) Law Rep. 4 Ch. 356.
(9) Ibid. 5 Ch. 746.
(10) Ibid. 219.
(11) 3 Madd. 158.
(12) 1 K. & J. 691.
(13) Law Rep. 1 Ch. 154.
(14) Ibid. 476.
(15) 36 L. J. (Bkcy.) 1.
(16) Law Rep. 1 Ch. 616.

regard to the repudiation of shares: *In re Cachar Company* (1); and misrepresentation: *Peek* v. *Gurney* (2).

Mr. *De Gex*, Q.C., for the Defendant *Staunton*:—

We did not demur because the bill charges personal fraud; but that a Defendant can by his answer claim the same benefit as if he had demurred or pleaded, appears from *Wray* v. *Hutchinson* (3); *Milligan* v. *Mitchell* (4).

Mr. *Kay*, in reply:—

The Defendants must shew that the Plaintiff has a remedy in another Court. This they have not shewn; whilst we shew that the Court of Bankruptcy has no jurisdiction. It was upon this ground that the Commissioner refused. The Plaintiff cannot obtain leave to sue in *Staunton's* name in a bill charging *Staunton* himself with fraud: *Travis* v. *Milne* (5).

That *Moojen* is a proper party appears from *Daniell's* Chancery Practice (6), referring to *Bowles* v. *Stewart* (7).

That *Maule* is not a necessary party appears from *Higgins* v. *Shaw* (8).

Mr. *Miller*, in reply, on *Bowles* v. *Stewart*.

Sir James Bacon, V.C.:—

The important question in this case—important not only as it concerns all the parties in the litigation, but as it concerns the administration of the law—is the point of the Plaintiff's capability of sustaining this suit. A bankrupt, whose bankruptcy is not closed, is, in my opinion, by very plain law incapacitated from maintaining such a suit. To permit him to do so would be to transfer from the Court which has full jurisdiction over the subject to this Court, which would have less extensive jurisdiction, a right which this Court has never assumed. No instance has been adverted to in which the Court has ever assumed the right of

(1) Law Rep. 2 Ch. 412.
(2) Ibid. 13 Eq. 79.
(3) 2 My. & K. 235.
(4) 1 My. & Cr. 433.
(5) 9 Hare, 141.
(6) 2nd Ed. p. 287.
(7) 1 Sch. & Lef. 209.
(8) 2 Dr. & W. 356.

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interfering with the administration in bankruptcy where bankruptcy exists.

The only two cases which were mentioned as exceptions to that rule are *Troup* v. *Ricardo* (1) and *Wearing* v. *Ellis* (2). In those cases, which were treated purely as exceptions, the reason was apparent. There it was not possible that any other step could be taken either under the bankruptcy or under the insolvency. In *Troup* v. *Ricardo* the Lord Chancellor's judgment points out the reason of the exception arising out of the difficulties that there existed. He founds his judgment upon the fact that there was no other means by which relief could be given to the Plaintiff—that there was nothing which the Insolvent Debtors Court could do for him or against him; and the Lord Chancellor most expressly guards himself against its being supposed that by the decision in that case he was infringing upon the principles of *Rochfort* v. *Battersby* (3) and *Wearing* v. *Ellis*. Now *Rochfort* v. *Battersby* is as strong a case as can be conceived upon the principle I am adverting to. The cause was brought upon appeal from *Ireland* into the House of Lords, and the Court, without going into the merits of the case, and with some degree of violence as it might seem to persons unacquainted with principles of law, itself took the objection that a man who unquestionably was improperly a party to the suit below could not be heard as Appellant there. Any objection to his being a party entitled to be heard must have been waived in the Court below. Nevertheless the House of Lords, upon principles which I believe have never been challenged, held there that it was impossible that a suit could be sustained by a man whose insolvency (as it was in that case) wholly disqualified him from suing in any other Court than the Court of Insolvency.

Now *Heath* v. *Chadwick* (4), before Lord *Cottenham*, contains in it very strong expressions, but not stronger than the exigency of the case required. He puts the case of an alleged collusion between the assignee and the demurring Defendant, and decides that it cannot signify what are the allegations in a bill, if a demurrer to the bill will, upon principle, lie. It is true that the facts stated

(1) 34 L. J. (Ch.) 91; 10 Jur. (N.S.) 1161; 5 N. R. 62; 13 W. R. 147; 11 L. T. (N.S.) 399.

(2) 6 D. M. & G. 596.

(3) 2 H. L. C. 388.

(4) 2 Ph. 649.

in the bill are admitted by the demurrer, but admitted only for the purpose of trying the question of law which is raised. The law in effect says to the Plaintiff: "Supposing that all you say upon these various subjects is true, nevertheless the law does not enable you to sustain a suit." It does not say, "These wrongs of which you complain shall go unredressed and unpunished," but it says, "You cannot obtain redress here." And for what reason? The plainest in the world. As a consequence of the bankruptcy, all the rights and interests which the bankrupt had at the time of his bankruptcy have become vested in other persons. The creditors are the persons who have all the rights the bankrupt ever had. Until they are satisfied, of course the bankrupt has no interest, and they can only be satisfied by carrying the proceedings in the bankruptcy to their legitimate and proper conclusion.

In this case, if a demurrer had been filed in the first instance, the matter might have been as readily disposed of as any other case upon that form of pleading. According to the view of the law which I take, every one of these Defendants might, and I am satisfied ought to, have demurred to the bill as it stood, notwithstanding the charges of wrongs committed by the Defendants. They have not thought fit to pursue that course. Two of them in their answers, and all of them at the bar, urge the point of want of jurisdiction. They all insist that, according to the well-established law, this Court cannot exercise any jurisdiction over the matter; or that if it can it will not, because the subject matter is before a tribunal which is perfectly competent to deal with every question that is here raised. I am of opinion, therefore, that the demurrer must prevail, and that the Plaintiff's bill must needs be dismissed. Unless I were to make a decision totally at variance with the terms and the principles of decisions that have been pronounced now many years ago, I could not entertain the prayer of this bill.

But then that does not dispose of the whole case before me. The Plaintiff has stated what he has to complain of, and the Defendants have put in answers. Evidence has been gone into, and many hours have been expended in discussing and arguing upon the facts of the case. It is plain that those facts were wholly irrelevant to the subject, if a demurrer would, as I have expressed my opinion that it does, hold in this case. But since

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the Defendants have chosen to go into that case, then, upon the subject of costs, a totally different consideration presents itself; and I must needs consider the case made by the Plaintiff, and met as it is by the Defendants, because I must decide whether the Plaintiff who has made these charges has shewn such reasonable grounds for making them as that, although the demurrer is allowed, he ought not to be called upon to pay any costs. Upon that subject the case, in my opinion, is one of the clearest that was ever presented. I will take the Defendants in the order in which they appear upon the record.

I first take Mr. *Frederick Moojen*, who has been a very active person in the whole business. At the commencement of this partnership between the Plaintiff *Motion* and the Defendants *John Hay* and *Briggs*, Mr. *Moojen* seems to have been the solicitor of the Plaintiff and *Briggs*, and to have enjoyed the confidence of all. Quarrels ensued very soon after the formation of the partnership. Mr. *William Hay* had a demand against the partnership, and he filed a bill and got an order that two of the partners, *Motion* and *Briggs*, and Mr. *Burdett* were to pay to him a sum of £6000 in respect of a joint debt due from the partnership. It is sufficiently clear in evidence that, at that time or soon after, there was money enough in the hands of the partnership—money enough, I may say, in the till—to have satisfied that joint debt; and no suggestion has been made—no shadow of an excuse given—why the £6000 was not paid out of the moneys which were in hand, when an order was obtained, at a later period, that the receiver should pay that sum out of the moneys in his hands, "after providing what was necessary for continuing the business of the partnership." It is said that these last words justified the receiver in not paying the money, and justified the other partners in not insisting upon the money being paid. I ascribe no such meaning to those words. When the receiver is told to pay all that he can after providing for continuing the business, what is meant is, "You must not so exhaust the assets that business shall come to a stop." That is all that is meant. The words mean that the receiver is not to lend to persons to carry on the business money that does not belong to the partnership, that is, money due to *William Hay*, and which has been collected by the partners as trustees or agents for him.

Then, there being abundance of money in hand to satisfy this joint debt, and *Moojen*, who was acting as solicitor for the Plaintiff and for his (*Moojen's*) own brother-in-law, *Briggs*, another partner, being perfectly conversant with all the matters in which the partners are interested, the money not being paid, *William Hay* issues an attachment, which is executed against the Plaintiff *Motion* only. *Motion* is thrown into prison for not having paid this partnership debt, the amount of which might have been discharged at any time, and he is suffered to remain there for four months. Then, some new light or some new opportunity being presented to his partners, who (it would be idle to deny) are proved from the beginning to have desired to get rid of him, Mr. *Burdett*, nominally a creditor (Mr. *Moojen* being in fact the owner of *Burdett's* debt), files a petition against the Plaintiff in bankruptcy, and he is adjudicated a bankrupt.

The proceedings in the bankruptcy go on under the control of Mr. *Moojen;* Mr. *Moojen* and Mr. *Oliver* for some time acting as the bankrupt's attorneys. The bill of costs, signed by *Oliver* and *Moojen*, puts that fact beyond doubt. Then a Mr. *Chidley* is appointed to be the solicitor for the assignee when the assignee was appointed.

Before this, an order had been made in the causes in which the partners were concerned, dated in April, 1864, dissolving the partnership, directing partnership accounts, and ordering that the property should be sold as a going concern with the approbation of the Judge.

That was the state of things when Mr. *Motion* was put into prison under the circumstances I have mentioned. He being a bankrupt, it was the interest of his assignee, and the duty of his assignee, then to press on that decree. The assignee had been made a party to the suit in the ordinary way, and the proceedings were carried on with the usual dispatch in the Chief Clerk's Chambers.

Before that there had been proceedings taken towards the execution of the decree. There had been a question about the £6000, which has been mentioned; and the Defendant *John Hay* having delayed taking steps for effecting a sale, and no steps having been taken, the Plaintiff endeavoured to press the sale on; and, Mr.

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Moojen and Mr. *Oliver* being then his attorneys, as Mr. *Oliver's* bill of costs shews, an attempt was made to carry the decree into execution, notwithstanding the delay of *John Hay*. The evidence shews that these proceedings were delayed from time to time, Mr. *Moojen* being an instrument in the delay; and that at length, when the summons was about to be proceeded with, Mr. *Moojen* comes before the Chief Clerk and puts a stop to all the proceedings there by announcing that his client, Mr. *Motion*, had been adjudicated a bankrupt; and so the matter is locked up for the time.

Well, then, the assignee being appointed, it appears that there were considerable differences of opinion as to the mode in which the assignee discharged his duty. Mr. *Johnstone* is nominated—I believe in perfect truth it is said—by Mr. *Moojen*, because Mr. *Moojen* proved his two debts, one a debt against the firm, and the other a larger debt against *Motion* himself; and, in order to secure his influence over the matter, bought up many of the debts. Mr. *Moojen* becomes dissatisfied with Mr. *Johnstone's* conduct as assignee, and gets him removed from being assignee. Another assignee is then appointed; and by this time it is evident many of the creditors of the bankrupt had become alive to his interest, saw that it was right that the decree should be carried into effect as the Court had pronounced it, were very desirous that justice should be done to the bankrupt—and more than that, perhaps, that justice should be done to themselves, they being large creditors, and having proved for a considerable amount. Accordingly, after some struggles, which are described clearly, and in which the creditors, taking the view I have last expressed, were upon all occasions opposed by Mr. *Moojen*, Mr. *Coxon* was appointed assignee. Mr. *Coxon* was a perfectly independent person. It was his interest and duty to have the proceedings in the Chief Clerk's Chambers carried on as rapidly as possible; and it was as plainly the desire and interest of Mr. *John Hay* that these proceedings should be delayed as much as possible. And although Mr. *Moojen* was not, in point of form, the solicitor for *John Hay*, it is clear that he was combining with *John Hay* to prevent the sale being carried on under the decree. That appears from the letter of the 8th of July, which has been read, in which Mr. *Moojen* suggests that, if they can tide over, so as to drive them into the long vacation, that would give them time

(these are my words, and not his)—time for the plan which, I say, he and his client and his friend had been endeavouring to carry into effect from the very commencement of the transaction, namely, to oust the Plaintiff, Mr. *Motion*, and not only that, but to secure to themselves the purchase of the interest which Mr. *Motion* was to be compelled to relinquish. Mr. *Coxon* seems to have been cajoled; he seems to have been told a great many things about references to arbitration, and the time was whiled away and nothing done until Mr. *Coxon* died in January, 1869. Then another opportunity presents itself. A new assignee has to be found. He is found by Mr. *Moojen*, and being so found, comes into the Chancery suit then pending.

I omitted to state that in Mr. *Coxon's* time another order was made, which changed the complexion of affairs considerably—an order of July, 1868—by which it was ordered that the partnership premises with the plant and effects should be sold by auction as a going concern, and that *John Hay* should have the conduct of the sale, but that neither *John Hay* nor *Briggs* should be at liberty to bid or become the purchaser thereof; and that *John Hay* should be at liberty to sell the debts due to the partnership by public auction or otherwise with the approbation of the Judge. That order was obtained while *Coxon* was the assignee. Then Mr. *Staunton* having been, as he states in his examination, procured by Mr. *Moojen*, and procured upon his indemnity, comes in; and he cannot, unless one shuts one's eyes to the plain facts of the case, be considered otherwise than as the partisan and instrument of Mr. *Moojen* and the persons for whom he was acting. Mr. *Staunton*, when he came in and assumed this office of assignee, became trustee for all the creditors, and not for any particular section of them. His duty was to act impartially as regarded the creditors, and to act with the utmost zeal as regarded the realisation of the bankrupt's estate. He came in, knowing that there was a decree of the Court which prescribed his duty and his rights most distinctly; and, as far as I can trace, from the time that he so came in, his object has been to get rid of that decree, not for any interest of his own (for it is not suggested now that Mr. *Staunton* had any interest), but for the interest of those persons who were directly opposed to the bankrupt, and whose object it was to get

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the property at such a price as they should think fit, and to exclude the bankrupt from any share or interest or right in the partnership. That design is carried on by Mr. *Staunton* as a mere blind partisan. Everything that is done is applicable only to that view of the case. The untrue and insincere attempts at reference are only parts of the same scheme and system for tiring out the Plaintiff, and the persons interested on his behalf, who were opposed to the views of *Briggs*. An agreement is entered into on the 15th of April for which there is no excuse or pretence whatever. What right had *Staunton* to enter into any such agreement? He had got a decree of the Court; his only duty was to enforce that decree. It might have been different if he had called a meeting of creditors —if the matter had been laid before the creditors—and they had been told, "It is better for you to put an end to litigation; consider this for yourselves." If he had taken any such step as this there might have been some excuse furnished for the conduct which he has pursued. As it stands I can find no excuse. His duty was plain. He has abandoned that duty in every respect in disregarding the interests of those creditors who, even if they were in a minority, ought to have been consulted. He goes behind their backs, without their knowledge—without any appeal to the Commissioner—without any communication with anybody in the world excepting Mr. *Moojen* and Mr. *Chidley*—and he enters into this agreement, which is said, and there seems some reason to believe is truly said, to have been an injurious agreement as far as the bankrupt's interests are concerned, and as far as the interests that Mr. *Staunton* had to represent were concerned.

Under these circumstances, can I hesitate to say that Mr. *Staunton* has plainly and intentionally preferred the interests and adopted the suggestions of his friend Mr. *Moojen*, instead of discharging his duty as a honest assignee in bankruptcy ought to do? In my opinion the whole thing is plain and distinct. The dates also shew that this must have been so; for, the agreement being on the 15th of April, the order of the Chief Clerk for the sale in the terms there mentioned is not obtained until the 15th of July following. There being a contemporaneous agreement, as has been observed very truly, throws the greatest possible doubt upon the honesty and intention of the parties. There is no suggestion that

that was communicated to the Chief Clerk, so that when he approved of this sale, he was aware of the terms contained in the supplemental agreement. Nor can I believe that if the matter had been truly represented to the Chief Clerk, any such order would have been made. If he had been told, as by Mr. *Staunton* he ought to have been told, "I am assignee; great difference of opinion exists amongst the persons for whom I am trustee as to the best mode of realising this part of the bankrupt's estate—I will take upon myself, as Mr. *Moojen* persuaded me, to say, I will consent to forego and give up that which the decree gives—I will gratuitously throw that away and adopt another system;"—if anything of that sort had been told to the Chief Clerk, it is clear he would not have made the order for the sale.

Then it has been said that the Plaintiff has been guilty of delay. I think every hour of the time has been thoroughly accounted for, and that the only delay which has taken place has been occasioned by the proceedings of Mr. *Moojen*, and of Mr. *Chidley*, who seems also to have been Mr. *Moojen's* instrument. What suggestion or excuse has been offered of that which Mr. *Moojen* stated upon his examination, that with the money of *Hay* and *Briggs* he paid *Chidley* £500 for costs? What costs? What had they to do with the bankruptcy? In what light can that be looked upon but as a payment to Mr. *Chidley* for him to be subservient to the interests of *John Hay* and *Briggs*? Bonus, not payment; bribe, not costs. A more improper transaction I never heard of, and never heard avowed with more calm, unblushing effrontery than by Mr. *Moojen* yesterday. I have looked at the proceedings in bankruptcy; Mr. *Chidley's* bill of costs on the choice of assignees is taxed, and the amount of it is said to have been paid by *Staunton*. No credit is given for the £500 received. That, in my opinion, is a transaction wholly culpable in itself, and shewing as distinctly as any other fact in the case can, that this has been a confederacy on the part of *John Hay* and *Briggs*, who have procured instruments in the shape of *Chidley* and *Staunton*, to carry into effect that arrangement which is an utter violation and outrage of the rights which have been established by the decree; and which, in the evidence, is said to have injured the bankrupt and his creditors greatly. For anything I know that may be so, although that I cannot go into. But having

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regard to the conduct which has been pursued against this unfortunate Plaintiff—who, before this litigation began, was a tradesman with a considerable capital in a most flourishing business, and who now finds himself utterly stripped—who has passed four months in prison and several years before the Court of Bankruptcy, and finds himself utterly stripped of the whole of his property—that he is without remedy I do not say. All I say is that he is without remedy in this Court, because the law, which is not made for him, nor for his hard case, has decided that he cannot file a bill or maintain a suit under the circumstances which here exist. But that he has been cruelly wronged, that the practice of this Court and of the Court of Bankruptcy has been perverted corruptly against him and the interests of his creditors, I entertain no doubt whatever; and I think that the conduct of each and every of the Defendants has been such as not only justifies me, but requires me imperatively, in dismissing the bill upon the narrow ground upon which I have been obliged to dismiss it, to do so without giving costs to any of them.

Mr. *De Gex*, on behalf of Mr. *Chidley* (who also supported the statement by his own asseveration in Court), denied that he had ever received the £500 referred to, or any part of it.

The VICE-CHANCELLOR:—Mr. *Chidley* must settle that with Mr. *Moojen*, who has stated on oath in Court that he paid Mr. *Chidley* £500.

The decree will be without prejudice to any proceedings the Plaintiff may be advised to take.

Solicitor for the Plaintiff: Mr. *W. E. Barron.*

Solicitors for the Defendants: Messrs. *Walter & Moojen;* Mr. *J. J. Cridland;* Messrs. *James, Curtis, and James;* Mr. *J. R. Chidley.*

In re CURTEIS' TRUSTS.

V.-C. B.
1872
July 6.

Voluntary Gift—Augmentation of Trust Fund—Investment in Names of Trustees—Resulting Trust—Advancement—Appointment.

A sum of consols was vested in the trustees of a marriage settlement, upon the usual trusts, for the husband and wife successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends and paid them to him under a power of attorney from the trustees, to invest an additional sum of £2000 consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, and paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—

Held, that there was no resulting trust of the sum of £2000 for the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund.

A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum of £2000 as an augmentation of the trust fund. Four years afterwards the husband and wife, under a power in the settlement, appointed the original fund, "or the trust fund and property representing the same," to two of their children:—

Held, that the appointment passed only the original fund, and not the augmentation.

ON the marriage of the Rev. *Cyril Thomas Curteis*, a sum of £11,188 £3 per Cent. Consols was transferred into the names of four trustees, and by his marriage settlement, which was dated the 8th of September, 1841, the trusts of the fund were declared to be for Mr. *Curteis* for life, and after his death for his wife for life, and after the death of the survivor upon trust for the issue of the marriage, as the husband and wife, or the survivor, should appoint, and, in default, for all the children equally on attaining twenty-one, with the usual clause of hotchpot. The trustees gave Messrs. *Child & Co.*, the bankers, a power of attorney to receive the dividends of any sum of consols standing in their joint names, and directed them to pay the dividends to Mr. *Curteis* during his life.

On the 12th of August, 1858, Mr. *Curteis* wrote a letter to Messrs. *Child & Co.* as follows:—

"Gentlemen,—Finding that my father, the Rev. *T. Curteis*, has

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placed £2000 sterling to my credit, I shall feel obliged by your purchasing £2000 stock in the £3 per Cent. Consols, and placing the remainder of the money to his account. I conclude the stock thus bought will be added to the sum now standing in my name, and that you will receive the half-yearly dividends, with this addition, as before. My father will be glad to hear what is the amount of the surplus paid to his credit.

"I am, Gentlemen,

"Your obedient servant,

"*Cyril T. Curteis.*"

In reply to this letter, Messrs. *Child & Co.* wrote on the 13th of August, 1858, to Mr. *Curteis*, informing him that the stock upon which they received dividends from him stood in the names of the four trustees, and asking him to inform them whether the £2000 should be bought in his own or in his trustees' names, and whether he had any consols in his own name of which they had no knowledge.

Mr. *Curteis* sent no written reply to this letter, but called at the bank, and spoke to one of the clerks upon the subject, and he then returned the letter of the 13th of August, having written a memorandum on it in these words:—"August 17th, 1858. Make the investment in the trustees' names.—*Cyril Thomas Curteis.*"

Messrs. *Child & Co.* made the investment in the name of the trustees, by which the stock was increased to £13,188, and continued to receive the dividends on the whole fund, and to pay them to Mr. *Curteis* till his death.

No notice was given to the trustees by Mr. *Curteis*, or any other person, of the addition to the stock, and no further evidence was produced of the intention of Mr. *Curteis* in making the investment in the trustees' names. There were four children of the marriage—*Thomas Samuel Curteis, Ellen Curteis, Rose*, the wife of *F. B. Burnett*, and *Agnes Curteis.*

By a deed poll, dated the 29th of January, 1862, after shortly reciting the marriage settlement as far as related to the sum of £11,188 consols, Mr. *Curteis* and his wife appointed that the said sum of £11,188 consols, or the trust fund and property for the time being representing the same, from and after the death of the survivor of Mr. *Curteis* and his wife, should be held in trust for all their

children, other than the said *T. S. Curteis* and *Ellen Curteis*, who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry.

Ellen Curteis died in 1864, having attained the age of twenty-one years.

Mr. *Curteis* died in September, 1870, having by his will, dated the 8th of July, 1870, bequeathed his residuary personal estate in equal moieties in trust for his two daughters, *Agnes Curteis* and *Rose Burnett*, and their respective children.

Mrs. *Curteis* died in April, 1871.

On the death of Mr. *Curteis* the question arose whether the sum of £2000 consols was intended by him for an augmentation of the trust fund, or whether there was a resulting trust for himself; and the trustees accordingly transferred that sum into Court under the *Trustees Relief Act.*

A petition was now presented by *Thomas Samuel Curteis*, to ascertain the rights of the parties and to distribute the fund.

Mr. *Amphlett*, Q.C., and Mr. *Marten*, for the Petitioner:—

We contend that the sum of £2,000 was intended as an augmentation of the trust fund, and that it was not affected by the deed of appointment of the 29th of January, 1862; consequently it became divisible as an unappointed portion of the trust fund among the children, and as the two surviving daughters are precluded by the hotchpot clause from taking any share in it, one moiety belongs to the Petitioner and the other moiety, being the share of the deceased daughter, falls into the estate of her father as her personal representative. The rule is well established that where a father transfers a fund into the name of his child, in the absence of evidence to the contrary, it is presumed to be an advancement: *Dyer* v. *Dyer* (1). The same principle must apply to a transfer into the names of the trustees of his marriage settlement. There could be no reason for his selecting those persons unless he wished them to hold it on the same trusts as the original fund. If he had meant it for his own benefit, he would have informed them of what he had done, and obtained their consent;

(1) 2 Cox, 92.

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for they had never consented to be trustees for him, nor did they intend the power of attorney which they gave to the bankers to relate to anything but the fund included in the settlement.

Mr. *Ware* (Mr. *Eddis*, Q.C., with him), for *Rose Burnett* and *Agnes Curteis*, and the trustees of *Rose Burnett's* marriage settlement:—

The sum of £2000 formed part of the personal estate of Mr. *Curteis*. There is no presumption in favour of advancement where the gift is to trustees. If a man makes a gift to another, it must, in the absence of evidence of intention, either belong to the donee who has possession of the thing given, or there must be a resulting trust for the giver. There can be no presumption of a trust for a third person. In the present case, such slight evidence of intention as exists is in our favour, for Mr. *Curteis* originally intended that the money should be invested in his own name, and his object in transferring it into the same names as the original fund seems to have been to enable the bankers to receive the dividends without a fresh power of attorney: *Bone* v. *Pollard* (1). Moreover, in the deed poll he makes no allusion to any augmentation of the fund. If, however, the Court should be of opinion that the sum of £2000 was included in the trusts of the settlement, we contend that it will pass with the rest of the fund under the appointment to *Rose Burnett* and *Agnes Curteis*, for the evident intention of the appointors was to deal with the whole fund which was subject to the power.

Mr. *Davey*, for the executors of Mr. *Curteis*.

SIR JAMES BACON, V.C.:—

I do not say that this case is so clear as to be beyond a doubt, but the evidence seems to me sufficient to enable me to pronounce an opinion as to the intention of the testator. When he directed the sum of £2000 to be invested in the names of the four trustees he did not communicate to them what he had done, and it must therefore be presumed that he intended them to take it in the character of trustees only. He placed the fund in

(1) 24 Beav. 283.

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their names by a deliberate act. What was his purpose in doing this? Why did he select these four persons out of all the rest of the world? It is contended that he intended a resulting trust for himself. What reason is there for supposing this? If he had meant the fund for his own benefit, he would have told the trustees of his intention. As he did not do so, it must be presumed that he intended it to be held upon the same trusts as the trust fund to which it was added. A considerable time elapsed before his death, and he did no act during that period to shew any contrary intention; for I do not think that the appointment of 1862 shews any such intention.

With respect to the second point, I can see nothing in the deed of appointment to raise any presumption that the testator meant to do more than he professed to do, namely, to appoint the sum of £11,188. Knowing, as he did, the state of the fund, he chose to deal with part of it only.

I am therefore of opinion that the sum of £2000 became subject to the trusts of the marriage settlement, and that it was not affected by the deed of appointment of 1862; and it must be declared that one moiety belongs to the Petitioner and the other to the executors of Mr. *Curteis*.

Solicitors: Messrs. *Wright, Bonner, & Wright;* Messrs. *Bridges, Sawtell, Heywood, & Ram.*

HILL *v.* HIBBIT.

V.-C. B.
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July 18.

[1868 H. 62.]

Practice—Costs—Taxation—Common Law Scale.

The costs of proceedings in Court in the course of which several witnesses were examined *vivâ voce*, and which involved the question whether a certain claimant was legitimate, were ordered to be taxed upon the common law scale, so as to give the equity counsel refreshers for every day after the first day of the hearing, as in the case of counsel of the Common Law Bar.

11 Ch. D. 208

THIS was an application that certain proceedings in this suit occasioned by a claim set up by *Sarah Angus Hay* might be taxed upon the common law scale.

V.-C. B. 1872 HILL v. HIBBIT.

The suit was for the administration of the estate of one *Wight*, who died intestate in 1867. In the course of the proceedings a claim to share in the distribution of the estate was brought in by *Sarah Angus Hay*, who alleged that, as the legitimate daughter of *James Angus Hay*, she was one of the next of kin of the intestate. The circumstances attending this claim were very remarkable, and involved a long and elaborate investigation, the question being whether *James Angus Hay*, the father of the claimant, had contracted a valid Scotch marriage with a woman who was living when he went through the ceremony of marriage in the *United States* with *Harriet Wight*, the mother of *Sarah Angus Hay*—in effect, whether *Sarah Angus Hay* was legitimate or the offspring of a bigamous connection. The claim was heard before Vice-Chancellor *James* in June, 1870. A number of witnesses from the *United States* and *Scotland* were examined in Court *vivâ voce*, and after a hearing which lasted several days, Vice-Chancellor *James* held that a previous Scotch marriage was proved, and dismissed the claim of *Sarah Angus Hay* with costs. On appeal this judgment was affirmed by the Lord Chancellor. *Sarah Angus Hay* was wholly unable to pay the costs, and eventually an order was made, upon further consideration, that the costs of Plaintiffs and Defendants of the said proceedings should be paid out of the estate of the intestate. It was now sought to get these costs taxed as at common law and not as in equity; the principal difference being that at common law, when a cause lasts more than one day, the counsel engaged are allowed a refresher fee for every day after the first; but this is not so in equity. It also appears that where (as in the present case) counsel of the Common Law Bar appear in a Court of Equity, the practice, in the absence of express direction, is to allow the costs so far as they include the fees of the common law counsel upon the common law principle, while the equity counsel engaged obtain their fees upon the basis of an equity taxation only. The Taxing Master thought that it was reasonable that the extra costs should be allowed, but felt bound to follow the usual practice.

Mr. *Kay*, Q.C., and Mr. *Bedwell*, in support of the application that the costs of the proceedings occasioned by the claim of *Sarah*

Angus Hay should be taxed as at common law, referred to *Parkes* v. *Stevens*, before Vice-Chancellor *James*, December 8, 1869, where, upon the trial of issues before the Court without a jury, the Vice-Chancellor directed the Taxing Master to tax the costs upon the same principle as they would be taxed at law.

Mr. *Miller*, Q.C., Mr. *W. W. Cooper*, and Mr. *Simmonds*, for other parties, supported the application.

SIR JAMES BACON, V.C., being of opinion that the application was reasonable under the circumstances, directed the taxation to be made upon the common law scale.

Solicitors: Mr. *Gedge*; Messrs. *Morley & Shirreff*; Messrs. *Sidney Smith & Sons*; Messrs. *Duncan & Murton*.

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ay 27.

HUGO *v.* WILLIAMS.

[1872 H. 83.]

Construction of Will—Estate for Life or in Tail.

A testator devised a freehold estate to trustees upon trust to permit his son, *G. A.*, and his assigns to receive the rents, issues, and profits during his life, and after his death upon trust to permit the first son of *G. A.* and the heirs male of his body to receive the rents, &c., during their respective lives severally and successively in tail male:—

Held, that the first son of *G. A.* took an estate tail in the property, and not merely a life estate.

THIS bill was filed by the vendor of an estate against the Defendant for specific performance of a contract to purchase the estate. The Defendant demurred for the purpose of obtaining the opinion of the Court whether or not the Plaintiff could make a good title.

The question arose under the will of *C. F. Andrew*, dated in May, 1840, whereby the testator gave and devised all his manor of *Nansough* unto and to the use of *H. P. Andrew* and *G. N. Simmons* and their heirs, upon trust, in the first place, to raise certain legacies, and, subject thereto, upon trust to permit his son, *G. H. Andrew*, and his assigns to receive the rents, issues, and profits of the said manor of *Nansough* during his natural life, and upon and immediately after his decease upon trust to permit the first son of his said son, *G. H. Andrew*, lawfully begotten, and the heirs male of his body lawfully issuing, to receive the rents, issues, and profits of the said manor for and during their respective lives severally and successively in tail male, and in default of issue male of such first son, upon trust to permit the second, third, and all and every other the son and sons of his said son, *G. H. Andrew*, severally and successively, according to their seniority and priority of birth, and the issue male of their respective bodies severally and successively in tail male, to receive the rents, issues, and profits of the said manor for and during their respective lives; and in default of such issue, upon trusts in precisely similar words in favour of several other sons and their children; and in default of issue male of such sons, upon trust for the testator's own right heirs for ever.

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The testator died in June, 1840, and his son, *G. H. Andrew*, died in March, 1858, having had one son, *C. F. Andrew*, who attained twenty-one in May, 1869. On the 3rd of June, 1869, *C. F. Andrew*, the grandson, assuming to be tenant in tail in possession under the will of the *Nansough* estate, executed an indenture whereby he conveyed and assured that estate to *Robert Rendell* and his heirs, freed from all estates tail and from all estates and interests, to take effect after the determination or defeasance of any such estate tail, to the use, however, of the said *C. F. Andrew*, his heirs and assigns, for ever; and that indenture was duly inrolled in Chancery as a disentailing assurance. The Plaintiffs, who claimed under *C. F. Andrew*, the grandson, alleged that he was, at the time of executing the said disentailing deed, entitled, as tenant in tail in possession under the said will, to the *Nansough* estate, and that by the operation of that deed he became tenant in fee simple of the same estate; and if this were so, and not otherwise, they could make a good title to the Defendant as purchaser of that estate.

The Defendant insisted that *C. F. Andrew*, the grandson, did not, upon the true construction of the said will, ever become tenant in tail thereunder of the said estate, and upon that ground only he refused to complete his purchase except under a decree of the Court.

Mr. *Charles Hall*, in support of the demurrer:—

The only question for the Court to decide is, whether, on the construction of the will of *C. F. Andrew*, the testator, there was an estate tail created of the *Nansough* estate in the grandson of the testator, in which case the vendor can now make a good title; or whether the testator intended to create a succession of life estates, in which case the vendor will be unable to make a good title. The purchaser is willing to complete his contract if the Court should be of opinion that the title is good.

The question arose in the case of *Seaward* v. *Willock* (1), in which there was a devise to *A.* for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as should be heirs of his or their bodies down

(1) 5 East, 198.

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to the tenth generation, during their natural lives; and it was held that *A.* took no more than a life estate; and the question also arose in *Mortimer* v. *West* (1), *Monypenny* v. *Dering* (2), and *Doe* v. *Stenlake* (3).

Mr. *Phear*, for the Plaintiff, was not called upon.

SIR R. MALINS, V.C.:—

The question raised upon this will is whether the limitation in favour of the first son of the testator's son, *G. H. Andrew*, creates an estate tail, in which case the title of the Plaintiffs is a good title, or whether it has created a life estate only, in which case the title of course is bad. What then is the effect of a devise to *A.* and his heirs during their lives? It is settled in the case of *Doe* v. *Stenlake* by the Court of King's Bench, and has been acquiesced in ever since, that a devise to *A.* and his heirs during their lives created an estate in fee simple. Lord *Ellenborough* there gives the true explanation of such a devise. He says: "The words 'during their lives' after the devise to the daughter and her heirs are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives." That is upon a devise to a man and his heirs, which is an estate capable of being enjoyed for ever. This is a limitation to a man and the heirs male of his body for their lives. I think the limitation to the heirs male of his body creates an estate tail, and the intention of the testator that there should be an estate tail is more distinctly shewn by the gift over in case the taker should die without issue male. It is an estate in tail male, and the words "during their lives" mean only that which is necessarily implied, that whoever takes under the limitation can only, in point of fact, have the enjoyment of it during his life. But it has not the effect of cutting down the estate of inheritance. The son, therefore, took the estate in tail male. He has suffered a recovery, and the Plaintiffs claiming under him take an estate in fee simple, and the title is good.

(1) 2 Sim. 274. (2) 2 D. M. & G. 145. (3) 12 East, 515.

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The demurrer will therefore be overruled.

I have been asked to preface the decree with the words, "This Court being of opinion that the first son of *George Hugo Andrew* took an estate in tail male, overrule the demurrer." This form of decree has been questioned by the Registrars; but I believe it is now settled that there is no objection to it. I will therefore make the decree in that form.

Solicitors for the Plaintiff: Messrs. *Gregory, Rowcliffes, & Rawle.*
Solicitors for the Defendant: Messrs. *Bell & Stewards.*

In re LORD STANLEY OF ALDERLEY'S ESTATE.

V.-C. M. 1872 June 7.

Petition for payment out of Court—Costs according to Local Act—Reinvestment in Land—Application to other purposes.

Where, under the provisions of local Acts which authorized the taking of land and the application of the purchase-money in the purchase of other land, or in the case of the parties interested being under disability towards the discharge of incumbrances on land settled to the same uses as that taken, and provided for the payment by the parties taking the land of the costs of a reinvestment in land:—

Held, that where a petition for payment out of Court of money paid in under the Act asked to have it applied towards paying off incumbrances on other land settled to the same uses, there was no liability to pay the costs of the Petitioners.

17 Ch D 819

THIS was a Petition for the payment out of Court of a sum of £1596 16*s.*, representing the purchase-money of certain land taken by the trustees of the *River Weaver Navigation.*

The land taken formed part of an estate devised by the will of the first Lord *Stanley of Alderley* to trustees, the survivor of whom was one of the Petitioners, upon trust to raise by sale or mortgage a sum of £40,000, and a sufficient sum to pay the costs of raising that sum, and subject to this trust to uses in strict settlement, some of which were still subsisting. The £40,000 was raised partly by sale of part of the estate so devised, and partly by mortgage of other portions.

The River *Weaver* trustees had power, under several of their Acts

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which were passed previously to the *Lands Clauses Consolidation Act*, to take land, and provisions were made for the case of such land being owned by persons under disability, and for the application of the purchase-money either by investing it in the purchase of other land, or in paying off debts or charges on property settled to the same uses as the property taken, and for the payment of the purchase-money into Court pending reinvestment; and by sect. 15 of one of the *Weaver* Navigation Acts (47 Geo. 3, c. 82) it was provided as follows:—

"Provided also, and be it enacted, that when by reason of any disability or incapacity of the person or persons, or corporation, entitled to any lands, tenements, or hereditaments to be purchased under the authority of this Act, the purchase-money for the same shall be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses in pursuance of this Act, it shall and may be lawful to and for the said Court of Chancery to order the expenses of all such purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said trustees out of the moneys to be received by virtue of this Act, who shall from time to time pay such sums of money for such purposes as the said Court shall direct."

The land in question, amounting to 4A. 2R. 30P., was taken in the year 1871 by the River *Weaver* trustees, and the purchase-money, when ascertained, paid into Court.

The Petition asked that the money might be paid out to the surviving trustee under the will of the first Lord *Stanley of Alderley* to be applied towards payment of the costs of raising the £40,000. It also asked that the River *Weaver* trustees might be ordered to pay the costs of the Petitioners.

The River *Weaver* trustees made no objection to the Petition except as to the costs.

Mr *Woodhouse*, for the Petitioners:—

The discharge of incumbrances on estates is one of the objects specified in the Acts for the application of the purchase-money of the land taken, and is really equivalent to the purchase of other

land. *In re Harrison's Estate* (1), where the Court held that there was no power to order the costs to be paid, was simply a petition for payment out to persons absolutely entitled. The Court will, if possible, put a reasonable construction on these Acts, as was formerly done by the Court of Exchequer under the old jurisdiction: *Ex parte Trafford* (2); *Ex parte Northwick* (3).

Mr. *Charles Hall*, for the River *Weaver* trustees:—

The principle on which *In re Harrison's Estate* depends is one which the Court must maintain. The jurisdiction is statutory, and the Court can only give such costs as the special Act authorizes. The cases cited for the opposite contention were founded on a wrong principle, which has been condemned, and is not the rule of this Court. The decision of Vice-Chancellor *Wickens* in *In re Charity Schools of St. Dunstan-in-the-West* (4) is identical with *In re Harrison's Estate*. He treated the question as the same in principle as that of *In re Cherry's Settled Estate* (5).

Mr. *Woodhouse*, in reply:—

The distinction between this case and *In re Harrison's Estate* is, that here the proposed application of the money is virtually a reinvestment in land.

SIR R. MALINS, V.C.:—

I am very sorry that I have not the power in this case of giving the Petitioner the costs, but I very carefully considered the matter in the case of *In re Harrison's Estate*, and there I came to the same conclusion as that upon which Vice-Chancellor *Wickens* seems to have acted without having the case which was before me cited to him—that in these matters of costs the Court can only give them in the particular cases which are provided for by the Act of Parliament. Now it is admitted that the only section of this Act which is applicable to the costs is the 15th. [His Honour then read the 15th section of 47 Geo. 3, c. 82, and continued:—]

Now is this a Petition to apply the money in the purchase of

(1) Law Rep. 10 Eq. 532.
(2) 2 Y & C. Ex. 522.
(3) 1 Y. & C. Ex. 166.
(4) Law Rep. 12 Eq. 537.
(5) 31 L. J. (Ch.) 351. 4 De G. F. & J. 332 8 Jur. N.S. 446

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other lands to be settled to the same uses? Mr. *Woodhouse* says that it is virtually the same thing, because it is paying off incumbrances on lands which are settled to the same uses. The case may be within the equity of the Act, but I cannot come to that conclusion in the face of the long line of authorities to the contrary, and therefore I am reluctantly obliged to decide that these costs are not provided for by the Act of Parliament. The consequence is, that the order must be to pay the money out in accordance with the prayer, but there will be no costs.

Solicitors: Messrs. *Tatham, Curling, Walls, & Pym;* Messrs. *Williamson & Co.*

V.-C. M. 1872 *June* 21.

In re ALCHIN'S TRUSTS. *Ex parte* FURLEY. *Ex parte* EARL ROMNEY.

Will—Charitable Gift—"Hospital" held to mean a general as distinguished from a special Hospital.

Gift by will to the *Kent County Hospital.* There being no hospital having precisely that name:—

Held, that a general hospital must be presumed to have been intended, and the *Kent County Ophthalmic Hospital* could not take the legacy, and that it must be divided between two hospitals—viz., the *Kent and Canterbury Hospital* and the *West Kent General Hospital*, which together supplied the place of a general county hospital.

Richard Thomas Alchin, by his will, which was dated the 25th of October, 1869, gave a legacy of £500 "to the treasurer for the time being of the *Kent County Hospital*, in aid of that institution." The testator died on the 1st of June, 1871, and the legacy became reduced by the operation of the *Mortmain Act* to the sum of £321 18*s.* 10*d.*, which was paid into Court by the executors.

By their affidavit, on paying this sum into Court, the executors stated that they were unable to ascertain what hospital the testator intended; but they mentioned the *Kent and Canterbury*

Hospital, situate at *Canterbury;* the *West Kent General Hospital*, situate at *Maidstone;* the *Royal Kent Dispensary*, situate at *Greenwich;* and the *Kent County Ophthalmic Hospital*, situate at *Maidstone*, as being the only charities having any similarity of name.

Petitions were presented almost simultaneously by the *Kent and Canterbury Hospital* and the *West Kent General Hospital*. The *Kent and Canterbury Hospital* was described as being an institution for the treatment of all classes of cases in every part of the county of *Kent*, and as having been established in the year 1793. The *West Kent General Hospital* was founded in the year 1832, under the name of the *West Kent Infirmary and Dispensary*, and assumed its present name in 1862.

The facts appearing in evidence were, that *Maidstone*, where the *West Kent General Hospital* and the *Kent County Ophthalmic Hospital* were situated, was only four miles from *Linton*, where the testator was born and passed the first nineteen years of his life; that since the formation of the *West Kent General Hospital* it had relieved cases coming principally from the western side of the county, and that during the same period the *Kent and Canterbury Hospital* had been chiefly occupied by cases from the eastern side of the county. It also appeared that the testator was the owner of some property at *Greenwich*, where the *Royal Kent Dispensary* was situated; that it was founded in the year 1783, and relieved cases from *Greenwich* and the country round. It was never a hospital in the sense of finding beds for patients; but it appeared that at one time, about the period when the will was made, steps were taken with a view to building a hospital in connection with it, but that the intention was afterwards abandoned. The *Kent County Ophthalmic Hospital* was founded in 1847, and relieved cases from the whole of the county of *Kent*.

Mr. *Freeman*, for the *Kent and Canterbury Hospital*:—

[The VICE-CHANCELLOR:—It must be very doubtful what institution the testator intended. Would it not be better to divide the fund?]

We are willing to divide it with the *West Kent General Hospital*, but not with the other claimants.

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In re ALCHIN'S TRUSTS.

Ex parte FURLEY.

Ex parte EARL ROMNEY.

Mr. *Cutler*, for the *West Kent General Hospital*:—

Bradshaw v. *Thompson* (1) is a distinct authority that it must be presumed that the testator had in his mind a general hospital, and the *Kent County Ophthalmic Hospital* must be excluded, as being for a special object only.

Mr. *Waller*, for the *Kent County Ophthalmic Hospital*:—

There is an actual decision of Vice-Chancellor *Stuart* that, under a similar designation, this hospital was intended. That was in a suit of *Pownall* v. *Beckett;* and the Vice-Chancellor, having first directed an inquiry in Chambers, decided that this hospital was entitled. I claim the whole legacy, but would acquiesce in a division amongst the three charities.

Mr. *Oswald*, for the *Royal Kent Dispensary*:—

Where it is doubtful what charity the testator intended, the only course is to divide the fund amongst all possible claimants; and there is just as much reason for introducing this institution into the division as any other: *Waller* v. *Childs* (2); *Simon* v. *Barber* (3); *In re Kilvert's Trusts* (4); *Bennett* v. *Hayter* (5).

Mr. *Batten*, for the executors.

SIR R. MALINS, V.C.:—

The testator has given a legacy of £500 to the *Kent County Hospital.* If there had been any such hospital, then, for the reasons stated by me in the opening of the judgment in *In re Kilvert's Trusts,* that hospital must have taken the legacy; but there is no hospital of that name. Now, I must assume the testator intended the gift for a hospital, for if he had intended a dispensary he might have said so. Therefore I cannot give any part of the legacy to the *Royal Kent Dispensary.*

Then there are three hospitals. First, there is the *Kent and Canterbury Hospital.* It is true, it is not called the *Kent County Hospital,* but it is both a *Kent* hospital and a county hospital;

(1) 2 Y. & C. Ch. 295.
(2) Amb. 524.
(3) 5 Russ. 112.
(4) Law Rep. 7 Ch. 170.
(5) 2 Beav. 81.

therefore I think that it must take part of the gift. But I think that the *West Kent General* is also entitled to share. I am satisfied the testator intended the legacy for one hospital only, but neither of the institutions completely answers the description. It must therefore, at all events, be divided between the two, as I considered to be the proper course in *In re Kilvert's Trusts* (1), and as was done in *Simon* v. *Barber* (2). Then the next question is, whether the *Kent County Ophthalmic Hospital* should also take a share. It is also a *Kent* hospital and a county hospital, but it is not a hospital of a general character; and when the testator speaks of a county hospital, I understand him to mean one of a general character. In *Bradshaw* v. *Thompson* (3) the Vice-Chancellor, in rejecting the claim of the *Westminster Ophthalmic Hospital*, treated the word "ophthalmic" as a most important part of the name. I think that consideration applies to the present case; the legacy will consequently be divided between the two institutions I have named. With regard to the decision of Vice-Chancellor *Stuart* in *Pownall* v. *Beckett*, if it had been a simple decision on the construction of the words, I should have held myself bound by it; but I am satisfied that it depended on the particular circumstances of the case.

Solicitors: Messrs. *Kingsford & Dorman;* Messrs. *Monckton & Monckton;* Messrs. *Palmer, Palmer, & Bull;* Mr. *Bristow;* Mr. *Evans.*

(1) Law Rep. 7 Ch. 170.
(2) 5 Russ. 112.
(3) 2 Y. & C. Ch. 295.

V.-C. M.
1872
June 24.

DUGDALE *v.* DUGDALE.

[1869 D. 146.]

Construction — Deficiency of Personal Estate—Marshalling—Legacy and Real Estate—Court of Appeal—Erroneous Decision.

Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it.

A testator after giving a pecuniary legacy devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts:—

Held, that the real estate was not bound to contribute rateably with the legacy to meet the deficiency.

Hensman v. *Fryer* (1) not followed.

THIS suit now came on for further consideration.

Henry Dugdale, the testator in the cause, by his will, dated the 25th of January, 1859, gave his wife, *Grace Dugdale*, a legacy of £500, to be paid to her within one month of his death; and after certain other dispositions, devised all those his manors, messuages, or tenements, farms, lands, ground rents, hereditaments, and premises of whatsoever tenure, freehold, copyhold, or leasehold, of or to which he was or at his death should be seised or entitled for any devisable estate or interest, or which he had power to dispose of by his will (except estates vested in him as a trustee or mortgagee), situate in the counties of *Lancaster* and *York* or elsewhere, to trustees upon trust, as to one moiety, for his wife during widowhood, and subject thereto upon certain trusts in favour of his children.

The will contained no charge of debts upon the real estate.

The testator died on the 13th of May, 1869. His personal estate proved insufficient for payment of his debts.

At the hearing, on the 11th of December, 1869, a declaration was asked for, on the part of the widow, to be inserted in the decree, in accordance with the decision in *Hensman* v. *Fryer* (1), that the legacy of £500 and the real estate were liable to contribute rateably to the deficiency; but the Vice-Chancellor considered the

(1) Law Rep. 3 Ch. 420.

authority of that case so doubtful that he declined to make such a declaration at the time, but left the question to be determined on the further consideration. (a)

The Plaintiffs were two of the testator's infant children.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for the Plaintiffs:—

Hensman v. *Fryer* (1) is exactly in point. It is a decision of the Court of Appeal, and is binding on this Court, and the bill is framed on the supposition that it is a binding authority.

Mr. *Pearson*, Q.C., and Mr. *Bedwell*, for some of the Defendants; and Mr. *Glasse*, Q.C., and Mr. *E. S. Ford*, for the trustees, were not called upon.

SIR R. MALINS, V.C.:—

The point as to marshalling the deficiency between the legacy and the real estate, was decided in *Hensman* v. *Fryer* under a misapprehension as to the effect of the decision in *Tombs* v. *Roche* (2), and I must refuse to follow it. The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous. There were in my recollection no less than three decisions of Lord *Westbury* which Vice-Chancellor *Stuart* declined to follow. One of the cases in which he did so was *Drummond* v. *Drummond* (3), which afterwards went to the Court of Appeal (4), and the decision was affirmed.

Solicitors: Messrs. *Milne, Riddle, & Mellor*; Messrs. *Johnston & Jackson*.

(1) Law Rep. 3 Ch. 420.
(2) 2 Coll. 490, 502.
(3) Law Rep. 2 Eq. 335.
(4) Ibid. 2 Ch. 32.

V.-C. M.
1872
June 25, 26.

In re PEACOCK'S ESTATE.

Legacies—Advances during Lifetime—Deductions from Residuary Bequest.

A testator gave to three of his sons, *Thomas*, *John*, and *Peter*, legacies of £500 each, and to his daughter £200, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his said legacy of £500 without bringing such sums into hotchpot. The residue of his property he divided between his four sons, *Charles*, *Thomas*, *John*, and *Peter*, and his daughter. The testator had advanced to *Charles*, at different periods before the date of his will, £500, £170, and £58, and to *Thomas*, after the date of his will, £500 and £380:—

Held, that the advances to *Charles* should not be taken into account against him, but that the £500 to *Thomas* was a satisfaction of his legacy, and the £380, being advanced after the date of the will, must be deducted from his share of the residue.

CHARLES PEACOCK, by his will, dated the 22nd of May, 1861, gave and bequeathed all his personal estate and effects whatsoever and wheresoever to his two sons, *Charles* and *John Peacock*, upon trust for his wife for life, and upon her decease upon trust to pay to his sons *Thomas*, *John*, and *Peter*, on their severally attaining the age of twenty-one, the sum of £500 a piece, and to invest for his daughter *Martha* the sum of £200; and the testator continued: "And I do hereby direct that neither of my said sons to whom I shall have advanced any sum or sums of money in my lifetime shall be entitled to receive his said legacy of £500 without bringing such sum or sums so advanced to him into hotchpot; and from and after such payments as aforesaid upon trust to divide the residue of my personal estate into four equal parts, and to pay and divide three of such four equal parts unto and equally between the whole of my sons *Charles*, *Thomas*, *John* and *Peter*, share and share alike as tenants in common;" and as to the remaining fourth part, the testator gave the same in trust for the separate use of his daughter *Martha Peacock*.

The testator died on the 18th of June, 1863. During his life he had advanced various sums of money to his children, which were entered in an account book in the following manner:—

"Advances.

"*Martha Peacock*	Dec. 3, 1851	£300
ditto	Dec. 16, 1859	30
ditto	March 15, 1860	20
"*Chas. Peacock*	May 22, 1857	500
ditto	May 22, 1859	170

"that I have to give account for." (Signed) *Chas. Peacock.*

ditto	Had at different times	£58
"*Thos. Peacock*	June 18, 1863	£380

"that I have to give account for." (Signed) *Thos. Peacock.*

"*Thos. Peacock*	June 18, 1863	£500."

The questions now raised on petition were, what advances were to be taken in account against the testator's sons, *Charles* and *Thomas Peacock*.

Mr. *Cole*, Q.C., and Mr. *Ince*, for the Petitioners:—

The words of the clause in the testator's will distinctly apply to all advances made to his sons during his lifetime. These advances are to be brought into hotchpot, and must consequently be deducted from the share which each son is entitled to out of the residue. The two sons, *Charles* and *Thomas Peacock*, signed receipts in the testator's account book for the sums paid to them, acknowledging that they were to be accounted for. The case is, therefore, precisely similar to *Upton* v. *Prince* (1), where it was held that a sum of £1500, advanced to a son during the testator's lifetime, was to be taken in satisfaction of a legacy left to him. Where a man gives equal portions to his sons, and then advances to them during his life sums of money admitted by them, those advances must be taken in reduction of the portion given by the will. In the case of *Thomas Peacock* there can be no doubt as to the intention of the testator, since the advances to him were made after the date of his will. In the case of *Montefiore* v. *Guedalla* (2), where there was a bequest of a share of residue for the benefit of the testator's son and his family, that was held to be adeemed by a subsequent advance by way of settlement on the son's marriage. In *Schofield* v. *Heap* (3) sums were advanced by a testator to his children on

(1) Cas. t. Tal. 71. (2) 1 D. F. & J. 93. 6 Jur. N. S. 319

(3) 27 Beav. 93.

V.-C. M. 1872 *In re* PEACOCK'S ESTATE.

their marriage and to establish them in business, which were held to be a satisfaction *pro tanto* of their shares of the residue bequeathed to them by his will; but this did not apply to small gifts made to the children from time to time by the testator. The same principle as to small gifts by a testator was applied in the case of *Watson* v. *Watson* (1).

Mr. *Macnaghten*, for the husband of the testator's daughter, followed the same argument.

Mr. *Pearson*, Q.C., and Mr. *North*, for *Charles Peacock*:—

The direction in the will is that neither of his sons to whom he should have advanced any sums of money should be entitled to receive his legacy of £500 without accounting for the same. This applies only to sums advanced up to £500, the amount of the legacy, and not to other sums advanced from time to time in small amounts. To *Charles Peacock* the testator gave no legacy, because he had advanced £500 to him before the date of the will. That will stand in satisfaction of the legacy, but the other sums also paid before the date of the will must be taken as small advances, and will come within the case of *Watson* v. *Watson*. They were not substantial advances, but trivial payments, such as a father might be supposed to give his child.

Mr. *Everitt*, for other parties in the same interest.

Mr. *Wright*, for *Thomas Peacock*, submitted that neither the £380 nor the £500 advanced to him by the testator ought to be taken in account against him.

SIR R. MALINS, V.C.:—

In the first place it is observable that the testator directs his trustees to pay to his three sons, *Thomas*, *John*, and *Peter*, a legacy of £500 each, and to his daughter *Martha* £200. Now he had a son *Charles*, to whom he gave no legacy, which is accounted for by the fact that he had advanced to him before the date of his will a sum of £500, and having advanced to *Martha* a sum of £300, he gave her only £200, shewing clearly that he intended to put all

(1) 33 Beav. 574.

the children on an equality. After this he directs that neither of his sons to whom he should have advanced any sum or sums of money in his lifetime should be entitled to receive his legacy of £500 without bringing such sum or sums so advanced to him into hotchpot. There are two questions arising upon this clause. The first is, whether the son *Charles*, to whom, in addition to the £500, advances of £170 and £58 were made during the testator's lifetime and before the date of the will, is bound to bring those sums into account and deduct them from his share of the residue. It has been argued for him that the testator did not intend any advances to be taken into account except such as went to the reduction of the legacies of £500 each, and I think that is the proper construction to be put upon the clause. It is true that in some respects the clause in the case of *Upton* v. *Prince* (1) has a resemblance to this case; but when you look at the circumstances, there is a great difference between the cases. There the testator had two sons, *William* and *Peter*, and four daughters, and in his lifetime gave his two sons £1500 a piece, for which he took their receipts, acknowledging that such sums were to be on account and in part of what the father should give them by will. Then, by his will, the testator recited that he had advanced to his children, *William*, *Elizabeth*, and *Sarah*, £1500 each, omitting any mention of *Peter*, to whom he had also advanced £1500; and he thereby in like manner gave to his three other children, *Peter*, *Mary*, and *Anne*, the several sums of £1500 a piece, and then gave the residue equally among all his children. The argument on behalf of *Peter* was that the omission of his name by the father in the recital of advancement shewed that he plainly intended a difference between his sons, the receipts given by both and the case of both being the same. The decree there was that the £1500 received by *Peter* in his father's lifetime was a satisfaction for what the father had given him by his will, and that he should not have another £1500.

Now, does that apply to the present case? I think not; and the words here are by no means the same. Here the testator directs that neither of his sons to whom he should have advanced any sums of money in his lifetime, should be entitled to receive his legacy of £500 without bringing such sums into hotchpot. That

(1) Cas. t. Tal. 71.

V.-C. M. 1872 *In re* PEACOCK'S ESTATE.

amounts, in my opinion, to a declaration that only those sums advanced towards payment of the legacy of £500 should be deducted, and not any small sums which might have been advanced.

With regard to the small sums advanced, I consider the case of *Watson* v. *Watson* (1) an authority for deciding that small amounts doled out at different times are not to be taken into account, whether given before or after the date of his will. I must, therefore, decide that none of the sums advanced to *Charles* are to be taken into account against him, or deducted from his share of the residue.

The next question is as to the advances made to the testator's son *Thomas*. I consider that the £380 must stand in a different position from the two sums of £170 and £58 advanced to *Charles Peacock*, since that sum was paid after the date of the will, and that must, consequently, be deducted from his share of the residue. Then as to the £500 advanced to *Thomas* on the day of the death of the testator, it is not consistent with honesty that he should not account for that sum, for it is palpable that the father considered that advance to be in satisfaction of the legacy of £500.

The general rule is, that whenever a testator gives an equal amount to all his children, and directs that any sums advanced shall be taken as part of the legacies, all money advanced after the date of the will, except small sums given from time to time, must be accounted for.

It will therefore be declared that the £500 advanced to *Charles* will not be taken into account against him, nor will the other advances made to him; but that the advance of £380 to *Thomas* will be deducted from his share of the residue, having been made after the date of the will, and his legacy of £500 will be declared satisfied by the payment on the day of the death of the testator.

Solicitors for the Petitioners: Messrs. *Doyle & Edwards*.
Solicitor for the Respondents: Mr. *J. Wilkinson*.

(1) 33 Beav. 574.

LLOYD *v.* PUGHE.

V.-C. M.
1872
June 26.

[1869 L. 3.]

Wife's Separate Estate—Bankers' Account in Name of Wife—Executrix Account.

A wife being executrix of her father paid the moneys she received into a bank in her own name as such executrix. The husband, it was alleged, sometimes paid in money to this account, and the wife paid cheques to her husband's creditors. The account remained for six years, when the husband died, and the wife died shortly afterwards:—

Held, that if the money, or any part of it, belonged to the husband, he had shewn an intention of making a gift of it to his wife, and it constituted part of her estate at the husband's death.

MRS. *LLOYD* was the executrix and a residuary legatee of her father, Mr. *Hugh Jones*. She had received various sums of money as such executrix, and had paid them into the *North and South Wales Bank* to the account of "Mrs. *Elizabeth Lloyd, Llanrwst*, sole executrix of the late Mr. *Hugh Jones*." The account was opened in May, 1862. It was in evidence that other sums besides those which Mrs. *Lloyd* had received as such executrix were paid into the bank to the same account by her husband, and that cheques were drawn by her for debts due by her husband, and for payment of tradesmen and other mutual creditors of husband and wife.

The husband died in July, 1868, and the wife died in September of the same year. The husband at the time of his death was indebted to the extent of about £100. Two suits were instituted. The first suit was for the administration of the wife's estate, in which it was alleged that she was at the time of her death possessed of considerable personal estate of her then late husband *Edward Walmesley Lloyd*, and which was and is subject to certain debts and liabilities of the said *E. W. Lloyd*.

Another suit was instituted to administer the estate of *E. W. Lloyd*, the subject of which was about £200, the produce of his household furniture and effects, which being actually in his possession at the time of his death, formed part of his estate.

The Chief Clerk had found that at the time of the death of the husband the balance of the account standing in the name of Mrs.

V.-C. M. 1872 LLOYD v. PUGHE.

Lloyd in the *North and South Wales Bank* belonged to the husband, but that it became the wife's, and that her estate was indebted to the husband's estate.

The causes now came on upon further considerations and summons to vary the Chief Clerk's finding, and the only question raised was, whether the sum of £374 in the bank formed part of the wife's separate estate, or whether a claim made against that account by the creditors of her deceased husband could be sustained.

Mr. *Cotton*, Q.C., and Mr. *Bradford*, for the representatives of Mrs. *Lloyd*:—

The money now claimed as belonging to the husband was received by Mrs. *Lloyd* as executrix of her father, and the account was opened in her name as such executrix. It was standing to her account up to the death of the husband, and he never took any steps to claim it or reduce it into possession. On the contrary, he allowed her to continue the owner, and it is said that he paid in money of his own to the same account. If he did so it was a gift to his wife, at a time when he was perfectly competent to make such a gift, and there was nothing unreasonable in his doing so, as he benefited largely by the property derived from his wife's relations. The only debt of the husband was of a trifling amount, and was contracted shortly before his death. His creditors can have no claim upon this money, and the finding of the Chief Clerk ought to be reversed.

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the creditors of the husband:—

Mrs. *Lloyd*, no doubt, received various sums of money as executrix of her father, but the account at the bank was a mutual account of husband and wife, out of which all the creditors of the husband, for the expenses of housekeeping, were paid for many years. It was, in fact, a family account, although for convenience it was allowed to remain in the name of the wife. It cannot be said that the amount standing to this account was the executrix account, as it must have been diminished or increased from day to day as the wants of the family required. It was in every respect the husband's money. If it had not been so, and if it was the wife's

separate estate, it is impossible to account for her having paid her husband's debts out of it.

Mr. *Procter*, for the Plaintiff in the suit for the administration of the husband's estate.

SIR R. MALINS, V.C.:—

The question which has been argued is whether a sum of £374, which stood to the credit of a banking account which was opened in May, 1862, formed part of the estate of the husband or of the estate of the wife. The account was opened in the *North and South Wales Bank* in these terms: "Mrs. *Elizabeth Lloyd, Llanrwst*, sole executrix to the late Mr. *Hugh Jones*." Now what was the meaning of opening this account in the name of the wife? The husband of an executrix is complete executor, gives receipts, sues, and does everything that the executrix can do. By this account, therefore, I can only treat him as having intended that his wife should, in respect of her father's property, have it under her sole dominion and be sole owner. That account is continued from 1862 down to 1868, when both the husband and wife died—the husband in July, and the wife in September. It appears that at the time of the husband's death he was indebted to a very trifling amount, and the debt in respect of which the suit has been instituted for the administration of his estate appears to have arisen shortly before his death. I am, therefore, unable to see that he was at any time incompetent to make the gift to his wife. Then, what is the meaning of a husband putting money in the name of his wife? It is not necessary for him to say anything. You can only infer the intention from the act; and *Dummer* v. *Pitcher* (1) has settled it finally, that wherever a husband does that, the law itself presumes it was with the intention of making a gift to his wife. Therefore this husband being, as far as I can see, perfectly in a situation to do so, and the main source of the money being the property which the wife got from her father, if he chooses to say, Now you shall be the purse-bearer, I will put into your name all I have, and you will draw out all we want for our subsistence, I can see no impropriety or inconsistency in the intention which

(1) 5 Sim. 35; 2 My. & K. 262.

V.-C. M. 1872 LLOYD v. PUGHE.

the law, in fact, attributes to the husband in such a case, that the property should become the absolute property of the wife if she survived him.

But it is said that part of this money was received by the husband, and did not properly belong to the executorship, though it was paid into this account, and that money was drawn out for the purpose of their living. All that, I think, may very fairly be assumed; but, from the irresistible effect of the conduct of the husband, in my opinion, by putting the account into the name of his wife, as it originally was as executrix, and continuing to pay his money, if he did pay his money, into that account, I can only attribute to him the intention which I think the law attributes to him, namely, that he intended the consequences of law should take place—that if she survived him, whatever was remaining to the credit of that account should be hers. I can see no improbability in it whatever. The Chief Clerk has found that at the time of the death of the husband the balance of the account was the husband's, but that it became the wife's, and that her estate is indebted to the husband's estate. How it is made out that she is indebted I am quite at a loss to see. I cannot concur in that finding; and the exception which has been opened is to shew that this was an erroneous conclusion. I entirely agree that it is erroneous; and, for the reasons I have stated, I am of opinion that the £374 was, at the time the husband died, part of the wife's estate.

Solicitors for Mrs. *Lloyd's* estate: Messrs. *Rooks, Kenrick, & Harston.*

Solicitors for the Creditors: Messrs. *Cole, Cole, & Jackson.*

In re MILLNER'S ESTATE.

V.-C. M.
1872
June 28.

Payment out of Court—Married Woman aged Forty-nine—Presumption against having Children by an existing Husband.

The presumption that a woman aged forty-nine years and nine months, who had been long married to a husband still living and had never had any children, would not have any by him, acted upon.

9 Ch.D. 388

PETITION.

Samuel Millner, by his will, devised certain freehold property to trustees on trust for *Charlotte Whitmarsh* for life, and after her death for such of her children as should attain the age of twenty-one years. *Eliza Whitmarsh*, one of the children, on her marriage with *Frederick Miles* in 1846, settled her share of the estate upon trust, after successive life estates to herself and her husband, for the children of the marriage who should attain twenty-one, and in default of children of the marriage for herself, her heirs and assigns, for ever.

The *Westminster* Improvement Commissioners in 1847 took a portion of the estate under the provisions of the *Lands Clauses Consolidation Act*, and paid into Court the proportion of the purchase-money representing the share of Mrs. *Miles*. She was born on the 30th of September, 1822, and was consequently now aged forty-nine years and nine months. She was married to her present husband on the 14th of May, 1846, and had never had any children.

The Petition was by the tenant for life and Mr. and Mrs. *Miles*, and prayed that the money might be paid out to them on their joint receipt.

Mr. *Davey*, for the Petitioners:—

The only contingent interests are those of the children of the marriage of Mr. and Mrs. *Miles*, and it may now be safely assumed that there will not be any. The presumption is, not that a woman nearly fifty years of age is past child-bearing, but that where a marriage has continued for twenty-six years, and there have never been any children, and the wife has attained that age, there will not

V.-C. M. 1872 *In re* MILLNER'S ESTATE.

be any. One of the latest authorities, *In re Widdow's Trusts* (1), carries the simple presumption against child-bearing nearly as far as this case.

SIR R. MALINS, V.C.:—

I think that the presumption is on the whole so strong that the order may be made.

Solicitors: Messrs. *Syms & Son.*

V.-C. M. 1872 *July* 2.

ADAMS *v.* ADAMS.

[1871 A. 11.]

Construction of Will—Death of Original Legatee before Date of Will—Substitutionary Gift to Children.

A testator bequeathed to his sister *Susan* all the property he might die possessed of for life, and after her decease he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the lifetime of his sister *Susan*, the share which would have been theirs to be equally divided among their children:—

Held, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent.

In re Potter's Trust (2) followed.

JOSEPH ADAMS, by his will, dated the 17th of November, 1864, gave and bequeathed to his sister, *Susan Adams*, all and everything of which he might die possessed, whether in land or houses, Government funds or securities, money in the bank or in his own possession, or property of any description whatever, the same to be for her sole use and benefit during her life, and after her decease he desired the said property to be equally divided among his brothers and sisters, and continued—"Should any of my brothers or sisters die (leaving issue) during the lifetime of my sister *Susan Adams*, the share which would have been theirs is to be equally divided among their children."

The suit was instituted for the administration of the testator's

(1) Law Rep. 11 Eq. 408. (2) Law Rep. 8 Eq. 52.

estate, for sale and partition, and that the rights of the parties might be declared.

The testator died on the 5th of January, 1865, leaving three brothers and two sisters surviving him. He had had another brother, *John Adams*, who died in September, 1849, leaving six children, who had all attained twenty-one; *Susan Adams*, the tenant for life, died in November, 1870. A question was now raised upon further consideration whether the children of *John Adams*, who died fifteen years before the date of the will, were entitled to a share of the estate.

Mr. *Pearson*, Q.C., and Mr. *Everitt*, for the Plaintiff, *Richard Adams*, the executor:—

The only question now raised in this suit is, whether the children of *John Adams*, the brother who died before the date of the testator's will, are entitled to a share of his property; we submit that this case is governed by *In re Potter's Trust* (1). There the bequest was to the nephews and nieces of the testator, and in case of the death of any of his said nephews and nieces leaving issue he directed that such issue should take the share that his, her, or their parent would have taken if living, and your Honour held that the children of nephews and nieces who died before the date of the will took by substitution the shares which their respective parents would have taken if living at the testator's death. It is impossible to see any distinction between these cases.

Mr. *Bovill*, Q.C., and Mr. *Eyre*, for the brothers and sisters living at the testator's death:—

The brother of the testator whose children are now claiming died fifteen years before the testator made his will; it is impossible, therefore, that he could have had any intention of including them under the words used in this will, and unless the words are in all respects the same as in *In re Potter's Trust* the Court would not be inclined to carry out a principle which goes far beyond other cases. In *In re Potter's Trust* the words were "in case of the death of my nephews and nieces leaving issue." Here the words are, "should any of my brothers or sisters die leaving issue during

(1) Law Rep. 8 Eq. 52.

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the life of my sister *Susan*." In this case, therefore, a time is specified, but there was no time fixed in *In re Potter's Trust* (1). The decision of *In re Potter's Trust* has on several occasions been discussed by other Judges, and your Honour's observations upon *Christopherson* v. *Naylor* (2) have been brought to their attention, and it is right to say that they have not always been acquiesced in. In *Habergham* v. *Ridehalgh* (3) Vice-Chancellor *James* held that the children of a legatee who was dead at the date of the will could not take; so also in *In re Hotchkiss' Trusts* (4) Vice-Chancellor *James* decided that children of a legatee who died before the date of the will could not participate. It is true that in *Gowling* v. *Thompson* (5) the present Lord Chancellor, when Vice-Chancellor, gave a fund to the issue of three brothers and a sister of the testator, who had died before the date of the will; but the circumstances of that case were very peculiar, because the testator there gave his property to all and every his brothers and sisters and their issue, he having two sisters but no brother alive when he made his will, and the gift to issue was therefore original and not substitutionary. That decision, however, was followed with the greatest hesitation by Vice-Chancellor *Bacon* in *Barnaby* v. *Tassell* (6). But the decision in *In re Potter's Trust* was thought particularly unsatisfactory by the Master of the Rolls in *Ireland*, as reported in the case of *Atkinson* v. *Atkinson* (7), where a testatrix having a power of appointment over a fund, bequeathed all her money under settlement to be divided, share and share alike, between her nephews and nieces, the children of those who might be deceased to be entitled to the share of their parent. The Master of the Rolls held that the children of a nephew who was dead at the date of the will were not entitled to a share of the fund; and discussed *Christopherson* v. *Naylor* and *Loring* v. *Thomas* (8); but in commenting upon your Honour's observations in *In re Potter's Trust* he was of opinion that the case of *Christopherson* v. *Naylor* had not been overruled, and that the principles of that case and of *Loring* v. *Thomas* were altogether different; that

(1) Law Rep. 8 Eq. 52.
(2) 1 Mer. 320.
(3) Law Rep. 9 Eq. 395.
(4) Ibid. 8 Eq. 643.
(5) Law Rep. 11 Eq. 366, n.
(6) Ibid. 363.
(7) 6 Ir. Rep. Eq. 184.
(8) 1 Dr. & Sm. 497.

Christopherson v. *Naylor* (1) decided that where there was a gift to a class, the gift, in the absence of express description, must be supposed to include only living objects; and that a gift by way of substitution of the share of members of the class who were dead at the date of the will must fail; but that where language is used by the testator which shews his intention, though apparently dealing with living objects, that the children of members of the class who were dead should take the share which their parents would have taken if living, then the children take as substantive legatees by way of original gift. That, he said, was the principle on which *Loring* v. *Thomas* (2) was decided; and the two cases could, consistently with every principle of true construction, stand side by side.

[They also cited *Coulthurst* v. *Carter* (3).]

Mr. *Glasse*, Q.C., and Mr. *E. Ford*, for other Defendants.

SIR R. MALINS, V.C.:—

I must admit that this case tries the principle in *In re Potter's Trust* (4) very severely, on account of the length of time between the death of the testator's brother and the date of the will. Suppose *John Adams* had lived till November, 1865, and had died the day before the death of the testator, who might not have heard of his death, what sort of justice would that rule have administered which would have excluded his children from the benefits given by the will, when the testator must evidently have intended to include them? There are many cases in which that occurrence might take place without the knowledge of the testator, as, for instance, when the legatee dies abroad, or dies on his voyage home. I cannot see the difference which depends merely upon the actual period of death, and I see the great advantage of the principle laid down in *In re Potter's Trust* as a general rule of application, and I think in the great majority of cases justice is more effectually done by such a rule. I cannot distinguish this case from that of *In re Potter's Trust*, and I cannot see why the children of *John Adams* should be excluded from the benefits given by the will. I am sorry to find there is so

(1) 1 Mer. 320.
(2) 1 Dr. & Sm. 497.
(3) 15 Beav. 421.
(4) Law Rep. 8 Eq. 52.

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much difference of opinion about this question. It is evident that in the case of *Atkinson* v. *Atkinson* (1) the Master of the Rolls in *Ireland* expressed dissent from the principle I laid down, and so also did Lord Justice *James*, when Vice-Chancellor, in *Hotchkiss' Trusts* (2), and they seemed to think that the case of *Christopherson* v. *Naylor* (3) had never before been questioned, notwithstanding that it had been treated as a case of no authority at the present day by Vice-Chancellor *Stuart* in *Parsons* v. *Gulliford* (4), and by the present Lord Chancellor, when Vice-Chancellor, in the case of *Gowling* v. *Thompson* (5). I am satisfied that the rule laid down in *Christopherson* v. *Naylor* has worked great injustice in a number of cases. I have repeatedly had the question raised and argued before me since I decided *In re Potter's Trust* (6), but I have invariably adhered to the principle I there laid down. I decided that case after very much consideration, and being convinced that it is one which is calculated to give effect to the intention of testators, and to carry out substantial justice, I shall continue to act upon it until my decision is reversed by a higher tribunal. I should certainly be glad if the parties would take this case before the Court of Appeal, in order that the question may be set at rest one way or the other, and, considering the opinion entertained by Lord Justice *James*, it is not unlikely that my decision may be reversed, together with the decisions of the two Vice-Chancellors who preceded me in entertaining the same opinion; but as long as it stands unreversed I shall continue to act upon it. I must, therefore, declare that the children of *John Adams* are entitled to share in the estate.

Solicitor for the Plaintiff: Mr. *F. Morgan.*
Solicitors for the Defendants: Messrs. *Bartley & Saxton.*

(1) 6 Ir. Rep. Eq. 184.
(2) Law Rep. 8 Eq. 643.
(3) 1 Mer. 320.
(4) 10 Jur. (N.S.) 231.
(5) Law Rep. 11 Eq. 366, n.
(6) Ibid. 8 Eq, 52.

DE WITTE *v.* PALIN.

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1872
July 5.

[1872 D. 104.]

Infants—Reversionary Interest—Scheme for Maintenance.

The Court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency.

PETITION.

John Freeman, by his will, dated the 8th of October, 1849, devised his real estate to his daughter, *Elizabeth Frances Freeman*, for life, with remainders, subject to a power given her to appoint a life interest to a husband, to her sons in succession in strict settlement, with remainder to the use of all and every her daughters and daughter in equal shares as tenants in common; and he gave his residuary personalty to trustees upon trust for his daughter for life for her separate use, without power of anticipation, and subject to a power to appoint a life interest to a husband, upon trust for the children of the daughter as she should, either alone or during any marriage jointly with her husband, appoint, and in default of appointment upon trust for her sons as therein mentioned, and if she had no son, in trust for such of her daughters as should attain the age of twenty-one years; if more than one, in equal shares as tenants in common.

The testator died in the year 1853, leaving both real and personal estate. His said daughter, on the 21st of November, 1854, married *Gerard De Witte*, having previously attained twenty-one.

By will dated the 5th of February, 1855, Mrs. *De Witte* appointed a life interest in the property to her husband, and by a deed poll dated the 22nd of April, 1868, she and her husband jointly appointed the real and personal estate of the testator upon trust for all and every her daughter and daughters who should be living at her decease, to be equally divided between them, share and share alike; and she directed that in case of any of her

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daughters dying under twenty-one, and without having been married, the share or shares of her or them so dying should accrue to the survivors or survivor.

Mrs. *De Witte* died on the 24th of May, 1868. Her only children were the Petitioners, her four infant daughters, the eldest of whom was born on the 4th of March, 1856. Mr. *De Witte* had lost or disposed of the whole of his life interest in the property, and the only mode of providing for the maintenance and education of the infants was by charging in some way or other their reversionary interest.

The Petition set out an opinion given by Mr. *Sprague*, an actuary, as to the best mode of effecting this object. He proposed that, with the sanction of the Court, an application should be made to some insurance company to advance a sum of £600 a year (which was considered to be a suitable amount) in addition to the premium on an insurance against the event of none of the daughters attaining the age of twenty-one, which he estimated at a single payment of £210, on condition that such advance were allowed to accumulate at compound interest. This scheme would consequently come to an end as soon as one of the daughters attained twenty-one.

The Petition asked that this scheme might be carried into effect, or that some other scheme might be sanctioned by the Court.

Mr. *Glasse*, Q.C., and Mr. *Charles Hall*, for the Petitioners:—

There would be no difficulty in the Court sanctioning a charge upon capital in possession, and there does not seem to be any more difficulty with regard to charging prospective interests.

Mr. *Schomberg*, Q.C., as *amicus curiæ*, mentioned that the Master of the Rolls had on one occasion made an order on a similar petition.

SIR R. MALINS, V.C.:—

I recollect a case when I was at the Bar, of *Ring* v. *Jarman*, where there was a gift of a reversion of real estate which might never take effect, and Vice-Chancellor *Stuart* authorized a present

advance of £6000 to the reversioner. The matter was opposed and went before the Lords Justices, who affirmed the decision of the Court below. This Petition simply asks to raise a sufficient sum to provide £600 a year. It is a clear case. The order will be to approve of the scheme generally, and refer it to Chambers to carry it out. In *Ring* v. *Jarman* the money was actually paid out of the property, its restoration being secured by a policy on the life of the infant for whose benefit the advance was made.

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Solicitors: Messrs. *Emmets, Watson, & Emmet.*

GIACOMETTI *v.* PRODGERS.

V.-C. M. 1872 *July* 10.

[1871 G. 51.]

Wife's Equity to a Settlement—Sufficient Maintenance—Marital Rights.

The Plaintiff filed a bill to establish her equity to a settlement of £6000, which accrued to her absolutely during her coverture. The husband, on the marriage, which took place in 1862, gave up an income of £400 a year at the desire of his wife, but he had no property and made no settlement. Subsequently to the marriage sums amounting to £56,000 consols were settled by the wife's mother and relatives upon her for life for her separate use, with remainder as to £200 a year for her husband for life, and subject thereto for the children. From 1862 she allowed her husband £100 a year till 1865, when he left her, and they had not since resided together. In 1870 the wife agreed, under pressure of a suit by the husband for restitution of conjugal rights, to allow him £300 per annum. She had saved out of her income £1000 a year for six years. There were two children, who were supported by the wife:—

Held, that the wife being amply provided for, and there being no proof of misconduct on the part of the husband, the Court would not interfere with his marital rights, and bill dismissed with costs.

Affirmed by L. J. J. 42 & Ch 38 N.

THIS was a bill filed by *Caroline Giacometti*, wife of *Giovanni Giacometti*, for a declaration that she was entitled, for the benefit of herself and her children, to an equity to a settlement of a sum of £6000, to which she had become entitled absolutely under the administration of the personal estate and effects of her aunt, *Laura Blades*. The Plaintiff was married in *London*, on the 15th of February, 1862, to the Defendant, *Giacometti*, a native of *Austria*,

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who was then a captain in the Austrian navy. At the time of his marriage he gave up, at the request of the Plaintiff, an appointment in one of the *Austrian Lloyds'* ships, which amounted to about £400 per annum, and had then little or no means of his own. At first the Plaintiff and her husband were supported by the Plaintiff's mother, and no settlement was made before the marriage, but on the 9th of December, 1862, the Plaintiff's mother executed a voluntary deed whereby she settled certain moneys on the Plaintiff for life, to her separate use, without power of anticipation, with remainder as to £200 per annum on the Defendant, *G. Giacometti*, for life, and, subject thereto, with remainder as to the whole of such moneys on the children of the marriage. On the 22nd of December, 1862, the mother executed another deed poll, whereby she appointed the interest and produce of a further sum of money to be paid to the Plaintiff for her separate use for life. Other moneys were also given by relatives, and the result was that the wife had for her separate use the income of £56,000 consols, the husband having under the settlements only the reversionary life interest of £200 a year.

The Plaintiff did not allow her husband to exercise any control over her separate property, but until the year 1865 she allowed him a yearly sum of £100.

Soon after the marriage differences arose between the parties, and they lived together unhappily till 1865, when the husband left his wife and went abroad, and they had never resided together since that period. There were two children of the marriage, one ten and the other eight years of age.

In March, 1870, in consequence of doubts having arisen in the Plaintiff's mind whether her marriage was valid, she commenced a suit in the Divorce Court, praying that her two children might be declared to be the legitimate issue of herself and the Defendant, and an order was made in accordance with the prayer.

The Defendant, *G. Giacometti*, had never in any way assisted in the support or maintenance of the Plaintiff or of her children, nor had he ever settled any property upon them, but they had been always supported entirely by the Plaintiff.

The Defendant had lately instituted a suit in the Divorce Court against the Plaintiff for restitution of conjugal rights. The Plain-

tiff did not appear by counsel, and a decree was made against her, when the Plaintiff, to avoid compliance with such decree, assented to an agreement, which was carried out by a deed dated the 9th of February, 1871, whereby the Plaintiff covenanted to pay to the Defendant an annuity of £300 during her life, and after her death an annuity of £100, and that she would provide for her own maintenance and the maintenance and education of her children so long as they should be left under her sole control, and that she would indemnify the Defendant against all demands that should be made against him in respect of her debts, liabilities, and engagements. And the Defendant covenanted that he would not take any proceedings for compelling the Plaintiff to live with him, and would not molest or interfere with her. By that agreement it was further provided, that nothing therein contained should affect any right of the Defendant in respect of the money which had devolved upon the Plaintiff as one of the next of kin of *Laura Blades*, or any other property to which she might thereafter become entitled.

The Plaintiff had saved out of her separate estate about £6000, which she charged with the payment of the annuity to the Defendant.

Allegations of misconduct and ill-treatment were made by the Plaintiff against the Defendant; but most of these allegations were struck out of the bill when amended.

The Defendant, on the other hand, denied having been in any way unkind to the Plaintiff, and alleged that it was entirely through her own strange and unaccountable conduct that they had been unable to live together. These statements were confirmed by the evidence of the Plaintiff's two brothers, who were on friendly terms with the Defendant, and had on various occasions befriended and assisted the Defendant in the difficult position in which he had been placed by the conduct of the Plaintiff.

Mr. *Karslake*, Q.C., and Mr. *Willis*, for the Plaintiff:—

This is a case for the discretion of the Court, and we submit that the wife is entitled to have the whole fund settled upon herself and her children.

The authorities upon the subject are collected in *Macqueen's*

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Law of Husband and Wife (1). In *Dunkley* v. *Dunkley* (2) the Court, under the circumstances of the case, directed the whole of a fund devolving upon the wife to be settled for the benefit of her and her children. In *Green* v. *Otte* (3) it was said to be usual for the Court to have regard to any settlement made upon the wife *aliunde* by the husband. Here there was none. In *Gardner* v. *Marshall* (4) reference was made to the large amount of property the husband had received from his wife, and the whole fund was there settled upon her and her children. In *Gilchrist* v. *Cator* (5) the whole fund was given to the wife; and so it was in *Scott* v. *Spashett* (6). These cases shew that it has been the custom, where the circumstances justify it, for the Court to give the entire fund to the wife. The Court sits as arbitrator, and has a discretion either to give the whole or a part to the wife. In *Vaughan* v. *Buck* (7) only two-thirds of the dividends of a fund were given to the wife; but, under the special circumstances of this case, the Court can do no otherwise than order the whole fund to be settled upon the wife and children.

Mr. *Glasse*, Q.C., and Mr. *Shebbeare*, for the Defendant:—

The husband's legal right is to have the whole fund, but there are, no doubt, authorities where, under special circumstances, a portion, and sometimes the whole, has been given to the wife. The only ground for the interference of the Court to deprive the husband of his marital right is the poverty of the wife and her necessity for a sufficiency to support herself. It is true that M. *Giacometti* made no settlement upon his wife, but he had an income of £400 per annum when he married, with a fair prospect of rising in his profession and obtaining a much larger income. All this he gave up, at the request of his wife, upon the marriage. She allowed him no more than £100 for pocket-money. It was only under pressure that the Plaintiff consented to settle £300 per annum upon him; but this is only a very small portion of her property, as she has no less than £56,000, all invested in

(1) Ed. 1872, p. 72.
(2) 2 D. M. & G. 390.
(3) 1 S. & S. 250.
(4) 14 Sim. 575.
(5) 1 De G. & Sm. 188.
(6) 3 Mac. & G. 599.
(7) 1 Sim. (N.S.) 284.

the Government funds, producing an income of £2000 per annum. That this is a most ample income is sufficiently proved by the fact that she has managed to save £1000 a year. There is no misconduct on the part of the husband. And even where there is a separation the Court has given the property to the husband, as in the case of *In re Erskine's Trusts* (1); no blame was there attached to either party, and the separation took place by mutual consent. *Spicer* v. *Spicer* (2) was even a stronger case, for it could not be said that the husband was free from blame, and yet the Court directed that the whole of the accruing fund should be paid to the husband. In *Aguilar* v. *Aguilar* (3) it was held that where a wife has an adequate settlement she is not entitled to any further portion of an accruing fund which the husband takes *jure mariti*, except in cases of desertion or insolvency; and in *Aubrey* v. *Brown* (4), where the husband had grossly misconducted himself, and where the wife had an income of only £260, still the Court gave the husband's assignees £250 out of a fund of £1150 to which the wife became entitled.

Mr. *Karslake*, in reply.

SIR R. MALINS, V.C.:—

This is a bill filed by Mrs. *Caroline Giacometti*, for the purpose of asserting her right to a settlement of a sum of about £6000, to which she has become absolutely entitled in possession during her coverture. At the time of the marriage between the Plaintiff and *G. Giacometti*, in February, 1862, the lady having nothing to settle, no marriage settlement was executed. They lived together in a very unhappy manner till the year 1865, when it appears the conduct of this lady had become utterly intolerable to her husband, and I have no doubt whatever upon the evidence that he was absolutely obliged, if he expected ever to have an hour's comfort, to leave her, which he did.

Up to this time, which was nearly three years after the marriage, the purse strings seem to have remained with the lady. During the coverture, there had been settled by the lady's mother

(1) 1 K. & J. 302.
(2) 24 Beav. 365.
(3) 5 Madd. 414.
(4) 2 Jur. (N.S.) 879.

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and given by relatives no less a sum than £56,000 consols, which became settled on the lady for her separate use, independent of her husband, producing a sum of about £2000 a year. But, notwithstanding her ample means, it never seems to have entered her mind that her husband was to participate in the enjoyment of their income, and she only allowed him a small pittance of £100 per annum, by way of pocket-money. From the year 1865 to 1872, she continued to enjoy the whole of her property, and her means were so ample that she managed to amass a sum of between £6000 and £7000, or at least £1000 a year, during the absence of her husband. He has directly sworn, and I have no reason to doubt the accuracy of his statement, that at her request, and at her instance only, he gave up his occupation as an officer in the Austrian navy, and was left without any means of existence.

In that state of things he instituted a suit in the Divorce Court for the restitution of conjugal rights, and though this lady could have had no difficulty in obtaining legal advice, she allowed the decree to be obtained by default, on the 19th of December, 1870. There are two children of this marriage, aged respectively ten and eight years, and previously to the suit instituted in the Divorce Court by her husband this lady took proceedings in that Court, nominally to obtain a declaration of the legitimacy of her children, about which there could be no doubt, but from all that is stated of her strange opinions, the object of the suit must have been substantially to obtain a declaration of their illegitimacy, and that she was the mother of two bastard children. In order to avoid the consequences of the decree against her in the suit by her husband, the Plaintiff was induced to come to an arrangement, which was carried out by a deed dated the 9th of February, 1871, by which she secured to the husband an income of £300 a year during his life, and he in his turn agreed by that deed not to molest her. It is in fact a separation deed.

It was in the latter part of the year 1870 that the Plaintiff became entitled to the £6000 to which she now asserts her equity for a settlement.

In order to arrive at a conclusion in such a case, it is necessary to have regard to what the doctrines of the Court are as to the

right of the wife to an equitable settlement. The principle is peculiar to the laws of *England*, and it proceeds upon this foundation: By the marriage the husband acquires the absolute right to all the personal property of the wife. But this Court allows the wife in a proper case to claim a settlement out of moneys accruing to her during the coverture. This property accrued to the wife during her coverture, and it is property, therefore, as to which she would be entitled to ask the Court to make a settlement upon her if the circumstances were such as to call for the interference of the Court.

Now what are the circumstances which call for the interference of the Court? I have always understood that the basis upon which the Court interferes with or intercepts the absolute right of the husband to take possession of the property which the wife has acquired during her coverture, is where it is shewn that the wife requires the provision which she asks the Court to make. Unless it is founded upon her poverty, that is to say, that she is not already provided with an income adequate to maintain her in her position in life, I apprehend that her right to a settlement falls to the ground. For example, suppose a case is brought before the Court where it is plain that the income of the wife is more than double what is sufficient to answer all her wants, and a sum of £10,000 accrues to her, the husband becomes bankrupt, and the question is between the wife and her husband's creditors, would any Court think of deciding that the wife was entitled to an equitable settlement when it was shewn that her wants were amply supplied? So in this case the lady, in my opinion, is bound to shew that, independently of the property which she desires to have settled upon her, she is not amply provided for. If she is amply provided for, then I take it to be clear, upon the principles of the Court, as well as the decision of Vice-Chancellor *Wood* in *In re Erskine's Trusts* (1), and of the Master of the Rolls in the case of *Spicer* v. *Spicer* (2), that she would not be entitled to a settlement. The principle is also particularly laid down by Sir *John Leach* in *Aguilar* v. *Aguilar* (3) where he says, "If he failed in his obligation to maintain the wife, either by the

(1) 1 K. & J. 302. (2) 24 Beav. 365.
(3) 5 Madd. 414.

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desertion of his wife or by his inability to assist in her support, this Court would fasten that obligation upon the property itself; but that principle would not apply where the wife had secured to her a competent separate maintenance." Now, has this lady secured to her a competent separate maintenance? She has been living apart from her husband for more than seven years. What is the sum she has for maintenance? It is admitted that before she gave her husband £300 a year, she had an income of fully £2000, and she has now, after paying her husband £300, a sum of £1700 a year. Is that a competency? Looking at her station in life, she being a lady in the middle class of life, with two children, who can, for one moment, hesitate in coming to the conclusion that for such a lady £1700 a year, although she has these two boys to educate, is an ample provision? Then, if we look at the result, what does it shew? From the year 1865 to the year 1872 she has saved £1000 a year. Can I have better evidence than that to shew that the provision which she has is ample? What possible ground, therefore, is there to interfere with the right of the husband? The gentleman has conducted himself with the greatest propriety. I say that with every confidence, because not a single member of the lady's family has sided with her. The trustee, the Rev. *Edwin Prodgers*, writes in 1865, in these terms:—"Dear *Giacometti*, I wish I could do more to alleviate your unhappy state; but we must, as you most properly say, rely upon an allwise and good God to support you under all your trials. One thing you are convinced of, that you can never expect to live happily for any time with your wife, so I can only recommend a change of residence and occasional visits to shew you do not wish to be guilty of desertion." I think this gentleman, Mr. *Prodgers*, if he had any reason to alter his opinion of Mr. *Giacometti* in the interval, would hardly have written as he did on the 17th of February, 1871, after the execution of the deed I have referred to:—"My Dear *Giacometti*, I write to you to say how glad I am to feel that at last my sister has consented to an arrangement which will give you an independent income for life. You are aware how much I have felt for you during the years you have been sorely tried, convinced that it was always your anxious wish to endeavour to study altogether the comfort and happiness of your wife, and

your conduct, since I had the pleasure of making your acquaintance, has always been so upright and honourable as to make it a pleasure to befriend you."

What other conclusion therefore can I come to upon the evidence before me than that this separation which has taken place is not to be attributed to any fault on the part of Mr. *Giacometti*, who I am satisfied behaved as a kind husband to this lady, but has been produced by some extraordinary state of mind on her part? I must therefore conclude that the separation is not in the slightest degree attributable to him, but wholly to her. The only thing alleged against him is that on some occasion, under great irritation, he used strong language. What that strong language was I have no intimation: but I am bound to say that if anything could have produced strong language on the part of any man, it was the course of irritation to which this gentleman was exposed for so many years.

Therefore, under all the circumstances of the case, I find no reason to deprive the husband of his right. The claim on the part of the lady, in my opinion, wholly fails; and in order to mark my disapprobation of the spirit of this litigation, and the charges which have been made by the lady against her husband, I dismiss the bill with costs.

Solicitor for the Plaintiff: Dr. *Zimmerman*.
Solicitors for the Defendant: Messrs. *Gray, Johnston, & Mounsey*.

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1872
July 10.

RAYNER *v.* KOEHLER.

[1872 R. 52.]

Administration—Plea that Defendant was not Administratrix.

A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the Defendant, the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the Defendant, who was "the only legal personal representative and also heir of the undisposed of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased :—

Plea, that the Defendant was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased :—

Held, that if the Defendant was not administratrix, she was executrix *de son tort*, and the bill could be sustained. Plea ordered to stand for an answer, with liberty to except.

THIS was a plea to a bill filed by *Ellen Rayner*, on behalf of herself and other creditors of *Lewis Koehler*, against *Louisa Micheline Koehler*.

The bill stated that in April, 1868, the Plaintiff obtained a judgment in the Court of Exchequer against *Lewis Koehler* for £18 2*s.* 6*d.* debt and £79 15*s.* 6*d.* costs. That *Lewis Koehler*, by his will dated the 12th of March, 1865, gave and bequeathed to his wife, the Defendant, *Louisa M. Koehler*, the usufruct for her life of half of his moveable and immoveable estate which he should have at his death, and he appointed the Defendant to be the chief guardian of his children under age. That *Lewis Koehler* died in November, 1871, and administration with the will annexed of his estate and effects had been granted to the Defendant, who now was "the only legal personal representative and also heir of the undisposed of moveables and immoveables of *Lewis Koehler*," and that the Defendant had received and entered into the possession and enjoyment of all the real and personal estates and effects of the said *Lewis Koehler*, deceased.

The bill prayed that the amount owing to the Plaintiff on the aforesaid judgment, together with interest thereon, might be paid to the Plaintiff, or that in default the personal and real estate of

Lewis Koehler might be administered by the Court, and that the real estate might be sold and a receiver appointed.

A plea was put in by the Defendant that she was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased person in the bill called *Lewis Koehler*, the supposed testator in the bill mentioned.

Mr. *Cotton*, Q.C., and Mr. *Osler*, in support of the plea:—

This bill states that the Defendant is administratrix of *Lewis Koehler*, and that she is the only legal personal representative and also the heir of the undisposed of property of the deceased. It also states that she has received and taken possession of the estate and effects. The plea is, that she is not administratrix or legal personal representative of the deceased. There is ample authority to shew that this is a good plea. In the case of *Cooke* v. *Gittings* (1) there was a bill of revivor against *A. B.*, and it alleged that a Defendant to the original bill had died, having by his will appointed *A. B.* executrix, and that she had taken on herself the execution of the will, and had possessed the assets and taken on herself the administration thereof. A plea that *A. B.* was not executrix was allowed. The allegation that the Defendant has taken out administration is inserted in the bill for the sole purpose of preventing its being demurrable. The test of a plea is, that if the matter pleaded to were struck out of the bill it would be demurrable. A bill filed against a person before administration is granted is demurrable for want of parties if it prays an account of the estate: *Rawlings* v. *Lambert* (2); and it was held in *Penny* v. *Watts* (3) that an allegation that the Defendant, being the person entitled to take out representation to a deceased party, refused to apply for it, and impeded the Plaintiff in procuring a grant of it to any other person, was not a sufficient answer to a demurrer founded on the absence of such representative. It is not necessary to deny possession of the assets, for if that were stated in the plea it would make it double and informal. If this were a suit against the Defendant as executrix *de son tort*, the legal personal representative would be a necessary party: *Creasor* v.

(1) 21 Beav. 497.

(2) 1 J. & H. 458.

(3) 2 Ph. 149.

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Robinson (1). The plea is sufficient; if true, it is a complete answer to the bill (2). In *Hill* v. *Neale* (3) a creditor of a testator filed a bill against *A.*, stating that he was the executor, and had proved the will, and that whether he had proved the will or not he had possessed himself of the personal estate of the testator, and praying an account. A plea that *A.* was not executor was held to be a good plea to the whole bill.

Mr. *Glasse*, Q.C., and Mr. *Hemings*, for the bill:—

It seems to have been forgotten that it is a man who is not named in the will who is an executor *de son tort*: *Carmichael* v. *Carmichael* (4). Here the Defendant is alleged to have taken out administration and to have possessed herself of the assets. It is not necessary to allege that she is executrix *de son tort*, but it is sufficient to allege the facts which shew it. There is no answer to the allegation as to the testator's will, or to the statement that the Defendant has taken on herself the execution of the will and has possessed herself of the assets. If that be true, she is executrix *de son tort*, and accountable accordingly. If executors elect to act, they are liable to be sued before probate, and cannot afterwards renounce: *Blewitt* v. *Blewitt* (5). If it were necessary to allege that the Defendant was executrix *de son tort*, the bill could be amended, and the Court would not allow a charge of this nature to be got rid of by a simple plea that the Defendant is not executrix. The cases cited were chiefly cases on demurrer.

In *Tempest* v. *Lord Camoys* (6), where a bill was filed for the administration of real and personal estate, a plea in bar by the alleged executors, that they had been prevented proving by the Plaintiff's entering a *caveat* in the Court of Probate, was overruled, and the plea was ordered to stand for an answer, with liberty to except; and in *Vickers* v. *Bell* (7) an executor who had not proved the will was held to be a proper party to an administration suit, provided that he had acted as executor, though he might not have received anything as such.

(1) 14 Beav. 589.
(2) Mit. Pl. 5th Ed. 276, n.
(3) 5 L. J. 144.
(4) 2 Ph. 101.
(5) You. 541.
(6) 35 Beav. 201.
(7) 4 D. J. & S. 274.

Counsel for the bill were stopped by the Court.

Mr. *Cotton*, in reply :—

The bill alleges that the Defendant is tenant for life of the real estate. There could be no demurrer to that. It is a bill to administer the real as well as the personal estate, having before the Court only the tenant for life, and not having any personal representative. Such a bill cannot be sustained, and the only proper way of meeting it is by a plea. There is no allegation that the Defendant is executrix *de son tort*.

[The VICE-CHANCELLOR :—But the plea admits what is equivalent to that.]

Vickers v. *Bell* (1) decides in effect that a decree cannot be made against a person unless he has acted as administrator. This bill states that the Defendant is personal representative; the plea says she is not, and a bill which is filed for administration without a personal representative is demurrable. By this plea we strike out of the bill the only thing which prevents it from being demurrable.

SIR R. MALINS, V.C. :—

On the face of this bill, if the allegations are true, and upon this plea they must be taken to be true, there is nothing more certain than that the Plaintiff is entitled to the decree asked. The Defendant by her plea must admit all the statements in the bill except such as she denies by the plea, therefore she admits that she has received and entered into the possession and enjoyment of all the real and personal estate and effects of *Lewis Koehler*, and, consequently, she must have in her hands the only property by means of which the debt due to the Plaintiff can be paid. It is clear that a person who takes possession of the property of a testator and proceeds to deal with it must be treated as an executor *de son tort*, and can be sued in that character; therefore it is quite clear that if I allow the plea I must give leave to amend. The Defendant states by her plea that she is not and never was the administratrix, and that she is not the legal personal representative; but the bill alleges

(1) 4 D. J. & S. 274.

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that she has possessed herself of the estate of the testator, and therefore if she is not administratrix she is at any rate executrix *de son tort*, and in that character the bill can be sustained. I think, therefore, that the proper course will be to direct that the plea shall stand for an answer, with liberty to the Plaintiff to except.

As to the cases cited, I do not find anything in them which is contrary to my view of this case. There is one part of *Cooke* v. *Gittings* (1), as to not giving leave to amend, which I certainly could not follow, and I think the principle of my decision is supported by the case of *Vickers* v. *Bell* (2).

Solicitor for the Plaintiff: Mr *J. P. Poncione.*
Solicitor for the Defendant: Mr. *W. Eley.*

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In re RUDING'S SETTLEMENT.

Settlement—Power to appoint by Will—General Bequest by Will of prior Date—Contrary Intention—Wills Act, s. 27.

14 LR. 53-4 St. 6-7. — 429

By a settlement dated the 6th of January, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:—

Held, that although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court had power in construing both instruments to consider the surrounding circumstances, which shewed that the settlor never intended the settlement to be revoked by a prior will; and that consequently the will was not an execution of the power.

THIS was a Petition for the payment out of Court of a sum of money which had been paid in under the *Trustees Relief Act.*

The Petitioner was the illegitimate son of *Rogers Ruding*, who died in August, 1856, without having made any permanent provision for the Petitioner. *John Clement Ruding*, the brother of *Rogers Ruding*, promised the latter on his deathbed that he would settle a sum of £1800, the amount to be received in respect of a policy of assurance on the life of *Rogers Ruding*, upon the Peti-

(1) 21 Beav. 497. (2) 4 D. J. & S. 274. 10 Jun 1876.

tioner and upon two other persons. Shortly after the death of *Rogers Ruding* his brother, *J. C. Ruding*, informed a lady named *Perette*, by whom the Petitioner was maintained and educated, that he had invested a sum of £600 for the benefit of the Petitioner in railway preference stock, and the dividends were paid regularly to her for the Petitioner during the life of *J. C. Ruding*.

In October, 1858, *J. C. Ruding* wrote to Mrs. *Perette*, and stated that he had executed a settlement under which the Petitioner would be entitled to receive £600 when he attained twenty-one, provided he, *J. C. Ruding*, did not, by writing or by his will, revoke the same, which he was not likely to do if the Petitioner conducted himself properly.

The settlement so referred to was dated the 6th of January, 1858, and was made between *J. C. Ruding* of the one part, and two persons therein named as trustees of the other part. It recited that *J. C. Ruding*, in consideration of love and affection for his deceased brother, and out of regard for his memory, was desirous of making some provision for the Petitioner and the two other persons named therein, one of whom was an illegitimate daughter of his brother, and the third was the mother of that daughter; and it was thereby declared that he, the said *J. C. Ruding*, and the two trustees should stand possessed of a sum of £1800 4½ preference stock in the *Caledonian Railway Company*, which had been transferred into their names, and of the stocks, funds, and securities upon which such railway stock should from time to time be invested, upon trust for such person or persons, for such interest or interests, and for such intents and purposes, and under and subject to such powers and provisoes as the said *J. C. Ruding*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and attested by, one or more credible witness or witnesses, or by his last will and testament in writing, should from time to time, or at any time or times, appoint, and in default of and until any such direction or appointment as to one-third part or share thereof upon trust absolutely for the Petitioner, his executors and administrators, if and when he should live to attain the age of twenty-one years, with a gift over, in the event of his dying under twenty-one, in favour of the five legitimate children of *Rogers*

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Ruding. And the other two-thirds were to be held upon similar trusts in favour of the other two persons therein named, that is, the illegitimate daughter of *Rogers Ruding* and her mother.

J. C. Ruding died on the 11th of May, 1860, having made and executed his will, dated the 2nd of December, 1857, five weeks before the date of the settlement, and thereby, after giving various legacies, he bequeathed the residue of all his effects and property of every description whatsoever and wheresoever unto the five legitimate children of his brother *Rogers Ruding*, in equal shares, with benefit of survivorship among them in case any or either of them should die before *J. C. Ruding*.

After the decease of the testator the dividends as they became due on a third part of the said sum of £1800 railway stock were duly paid by the surviving trustees of the settlement to Mrs. *Perette* for the benefit of the Petitioner.

In March, 1872, the said trustees sold the £1800 railway stock, in order to pay it over in equal third parts to the three persons entitled thereto under the settlement, but they were then advised that they could not safely do so, for that the residuary bequest in the will of *J. C. Ruding*, though executed before the indenture of settlement, operated upon and comprised the said sum of £1800 stock.

In consequence of this advice the trustees paid the money into Court under the *Trustees Relief Act*, and it was now represented by the sum of £2049 4*s*. Bank Annuities, standing in the name of the Accountant-General to the credit of this matter.

The Petitioner attained the age of twenty-one in May, 1866. It appeared from the evidence that *Rogers Ruding* was at one time a man of good property, and *J. C. Ruding* was connected with him in business. From some circumstances *Rogers Ruding* lost his property, and had no means of providing for his two illegitimate children. By the affidavit of the lady who had nursed him in his last illness, and who was the mother of one of the children, it was stated that *Rogers Ruding* saw his brother, *J. C. Ruding*, every day, and begged him to allow his illegitimate children and their mother to have his furniture, plate, linen, books, &c., as well as the sum for which he had insured his life. This *J. C. Ruding* promised he would do, and putting his hand

into the hand of his dying brother three times, gave him the solemn promise that nothing should induce him to do otherwise, whereupon *Rogers Ruding* said he should die more happy after that promise.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, in support of the Petition:—

In this case it is impossible to doubt what the intention of the testator was. He made his will in December, 1857, giving his residuary property to the five legitimate children of his brother, and five weeks after he had made his will he executed the settlement whereby, in pursuance of the promise made to his brother on his deathbed, he settled the sum of £1800, which was derived from the policy upon his brother's life, upon the two illegitimate children of his brother, and the mother of one of them. The settlement was unfortunately prepared in the usual form when it is intended to give the settlor a power of revocation; that is to say, in trust as the settlor shall by deed or will appoint, and in default of appointment to the three persons who were to benefit by it. It cannot be supposed that this gentleman had studied the last *Wills Act*, so as to be aware that he had at one and the same time executed a settlement and revoked it. He could not have supposed that by a previous will he had also executed the power in the settlement he was then making, but this would be the effect of the *Wills Act*, which provides that a general bequest of property shall be held to include all property over which the testator has a power of appointment, and also that the will shall speak from the death of the testator. In construing a will, however, the Act provides that that shall be the effect unless a contrary intention shall appear. If ever there was a contrary intention apparent, it certainly is so in this case, and the evidence makes it conclusive that the testator never intended the will to be an execution of the power. The words of the power are, that the property shall be held upon such trusts as the settlor "shall" by deed or will appoint, and this must necessarily point to a future will, and not to a will already made, which could not be a will which shall be made.

This question, however, is not devoid of authority. In the case of *Moss* v. *Harter* (1) certain property was settled as the settlor

(1) 2 Sm. & Giff. 458.

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should by deed or will appoint, and in default of appointment to himself for life, and then to other persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. He then made a will, and gave all his personal estate not otherwise effectually disposed of, and it was held that the settlor had sufficiently expressed an intention not to affect the unappointed property comprised in the settlement. You must, for the purpose of ascertaining the intention of the testator, incorporate the will with the settlement, and then the recitals in the settlement make it manifest that the will was not intended to be an execution of the power.

Mr. *Higgins*, Q.C., and Mr. *Law*, for some of the legatees under the will, supported the view taken by the Petitioner.

Mr. *Glasse*, Q.C., and Mr. *D. Jones*, for other legatees under the will, declined to argue the case against the Petitioner.

Mr. *Ince*, for *Caroline Ruding*, one of the *cestuis que trust* under the will.

Mr. *Cole*, Q.C., and Mr. *Shebbeare*, for the trustees:—

As some of the legatees under the will are abroad, and their consent cannot be obtained, we must submit, in opposition to the Petition, that whatever might have been the intention of *J. C. Ruding* the law is clearly against the Petitioner. It may possibly be a hard case, but this must not induce the Court to put a wrong construction upon the Act of Parliament, which is distinct. The 24th section of the Act (1 Vict. c. 26) makes the will speak from the death of the testator; and the 27th section enacts that a general devise includes a power unless a contrary intention appears by the will. At the time this testator made his will he certainly intended everything he had to pass by the will, and no such contrary intention as the Act requires appears upon the will itself. The Court cannot look to circumstances outside the will for the purpose of construing it, much less can it regard circumstances which took place after the date of the will to shew what might have been the intention of the testator had he made his will at a subsequent period. The testator might very possibly

have intended to revoke the settlement. He must be taken to have known the law which made his will an execution of the power. Instead, therefore, of executing a separate instrument he allowed his will to stand unaltered, for the purpose of effecting his intention without further trouble.

The question in *Moss* v. *Harter* (1) was totally different from this. There there was a settlement subject to a general power of appointment in the settlor, and this having been made in 1858, the settlor made his will in 1862, and by that will you see an intention expressed that it should not operate as an execution of the power over the unappointed property. The case was decided upon a contrary intention appearing in the will itself. In *Stillman* v. *Weedon* (2), where property was settled as the settlor should appoint by deed or will, to be executed in manner therein mentioned, it was held that the will, though made before the settlement, was a good execution of the power. A similar decision was made in *Patch* v. *Shore* (3) and in *Cofield* v. *Pollard* (4); and in *Hodsdon* v. *Dancer* (5), where the will was made in 1845, and in 1849 certain real estate was settled to such uses as the testator should by will appoint, it was held that, upon the true construction of the 24th and 27th sections of the *Wills Act*, the disposition by the prior will was a good execution of the power contained in the subsequent settlement. The principle is well expressed in the case of *Scriven* v. *Sandom* (6). The Court cannot decide in opposition to these authorities, but must hold the will to be a good execution of the power in the settlement.

[They also cited *Bush* v. *Cowan* (7), in which the Master of the Rolls made observations upon *Moss* v. *Harter*, and Lord *St. Leonards* on Powers (8).]

SIR R. MALINS, V.C.:—

This case is certainly not free from difficulty; but upon the whole I come to the conclusion that the settlement remains in force. I cannot receive parol evidence to shew the intention of

(1) 2 Sm. & Giff. 458. 18 Jur. 973
(2) 16 Sim. 26.
(3) 2 Dr. & Sm. 589. 10 Jur. N.S. 383
(4) 3 Jur. (N.S.) 1203.
(5) 16 W. R. 1101.
(6) 2 J. & H. 743.
(7) 32 Beav. 228. 9 Jur. N.S. 499
(8) 8th Ed. p. 305, 306.

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the testator in executing his will, but in order to put a construction upon the instruments which he executed, namely, the will, and the voluntary settlement in question, I can look at all the surrounding circumstances to see as well as I can what was the intention of the testator in executing those instruments.

It appears by the evidence that *Rogers Ruding* was at one time a man of good property, but having lost it all he had no means of providing for his two illegitimate children. There is the affidavit of the mother of one of the children, which is not attempted to be contradicted, shewing the promise which was made by *J. C. Ruding*. *Rogers Ruding* died in August, 1856. *John Clement Ruding* made his will on the 2nd of December, 1857, and by that will no provision was made for the illegitimate children of his brother.

Upon the general question I intend to raise no doubt that a will containing a general bequest of property under the 27th section of the *Wills Act* passes all property which the testator has at the time of his death, including all the property over which he has a general power of appointment, whether the general power was created before or after the date of the will. Upon that subject I must be understood as not raising the slightest doubt.

Five weeks after the date of the will, that is, on the 6th of January, 1858, *J. C. Ruding* executed the settlement in pursuance, I take it to be perfectly clear, of the engagement which he had entered into with his brother—the solemn promise which he had given his dying brother.

On the 6th of January, 1858, then, Mr. *J. C. Ruding* must be considered as knowing that he had made a will by which he gave all his property to the legitimate children of his brother. He knew, therefore, that if this will operated as an execution of this power, and he had died the day after the execution of this instrument, his will, which was executed five weeks before, would absolutely have taken away that very provision which he had made for these children of his brother. Now could he possibly have intended that? I must attribute to him the knowledge that the will, if it remained unaltered, would come into operation, and he knew that if that will took effect his brother's legitimate children would take everything. Although it is perfectly true that, as a general rule, under the words of the Act, a general

bequest will pass all property over which a testator has a general power of appointment, yet I think there is nothing in the *Wills Act* which prevents the Court looking at all the surrounding circumstances, and seeing whether it is possible to say that the testator could intend his will to have that operation. Now, knowing that his will would pass all his property, am I not bound to decide that by this settlement he intended to take something out of the operation of his will? If he intended to take out of his will the property comprised in this deed, then all is perfectly rational. Can I arrive at that conclusion? The letter the testator wrote to Mrs. *Perette* seems to corroborate the view I take of the case, that although he intended to reserve the power of revoking the trusts of the settlement, it was his intention to execute the power which he was to have either by a deed, which would necessarily be executed afterwards, or by a will, which was not to be a will already executed, but a will which he might thereafter execute. The cases which have been cited of *Stillman* v. *Weedon* (1), *Cofield* v. *Pollard* (2), *Patch* v. *Shore* (3), and *Hodsdon* v. *Dancer* (4), were all cases totally different from the present, where the effect was not to defeat anything the testator had shewn a deliberate intention of doing, and which would remain undone except by some subsequent act; but they were cases proceeding upon the doctrine that a bequest in a general form, in the absence of such extraordinary circumstances as exist in this case, will operate as an execution of a power whether it come before or after the making of a will, whether created by a different person or by the testator himself. But here I come to the conclusion that it was the intention of the testator to take this out of his will because he knew that by his will he had disposed of all his property. The recital in the settlement and the evidence of the person who nursed *Rogers Ruding* in his last illness afford the strongest proof of this intention. Is it not the duty of the Court, if it can possibly see any rational way of getting out of the strict rule of law in such a case as this, where the intention is, beyond doubt, to do so? Mr. *Glasse*, representing members of the family, very properly did not argue the case. Mr. *Cole*, I am sure, would have taken the same view if he had not

(1) 16 Sim. 26.
(2) 3 Jur. (N.S.) 1203.
(3) 2 Dr. & Sim. 589.
(4) 16 W. R. 1101.

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represented persons abroad who are incapable of binding themselves; but under the circumstances it was his duty to say all that could be said for them. I think it is perfectly clear that to set aside this settlement would defeat the testator's intention; and I come to the conclusion I do, on the particular circumstances of this case. I am bound to say now that I do not think I am going one tittle further than Vice-Chancellor *Stuart* did in *Moss* v. *Harter* (1), where he saw that the intention would be effected by the construction put upon the will. The words there were "not otherwise disposed of in this my will," and the Vice-Chancellor went rather far in coming to the conclusion that it meant "not otherwise disposed of by another instrument." I am fortified in that view by the passage read from Lord *St. Leonards*' Treatise on Powers (2), where, after citing *Moss* v. *Harter*, he says—what I entirely concur in—"The case is not without difficulty, but where the property is, as in this case, settled by the testator himself upon others in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power."

I think, therefore, in this case, where the testator has shewn so deliberate an intention to settle property upon others, under the very peculiar circumstances of this case it is my duty, in accordance with that, to come to the conclusion that it requires some strong circumstances to lead to the opinion that he intended a will already made, which if he had died an hour after the settlement was executed would have entirely defeated the settlement, should have that effect. I think I put the right interpretation upon his acts, looking at all the surrounding circumstances and the contents of the deed, in coming to the conclusion that what he intended when he reserved a general power by the settlement was that it was to be exercised by a will thereafter to be executed and not by a will already executed. Upon these grounds, I decide that the settlement of 1858 remains in full force, and that the general power contained in it was not executed by the will of the 2nd of December, 1857.

It further appears that the testator having died in 1860, this

(1) 2 Sm. & Giff. 458. 18 Jur. 973. (2) 8th Ed. pp. 305, 306.

interpretation of the settlement was acted upon by all parties for twelve years.

The order will be, the Court being of opinion that the will of the 2nd of December, 1857, did not execute the power contained in the settlement of the 6th of January, 1858, order payment accordingly.

The costs of all parties must be paid out of the fund, and the residue divided in thirds.

Solicitors for the Petitioner: Messrs. *Johnston & Jackson.*

Solicitors for the Respondents: Mr. *A. T. Cox.;* Messrs. *Vandercom, Law, & Co.*

TRAVERS *v.* TRAVERS.

[1871 T. 67.]

No Residuary Bequest—Executors—Intestacy as to Residue.

A testator appointed two of his sons executors, and gave various legacies, but made no residuary bequest. By a codicil he directed his two executors and three of his principal legatees to pay all expenses attending the proving of his will, and administration and winding-up of his estate, in equal proportions, according to the nature of the property they derived under his will and codicil, it being his express desire that no part of such expenses should be borne by the residuary legatees, but that they should receive the residue free of all deductions for expenses:—

Held, that the appointment of executors had no operation as to the beneficial disposition of the residue; and that being undisposed of by the will, the codicil left the matter in the same position, and there was an intestacy as to the residue.

NICHOLAS TRAVERS, by his will, dated in April, 1869, gave various legacies to persons therein named, including his two sons, *N. Travers* and *F. Travers*, and also *H. Strickland*, *E. Falkner*, and *J. Falkner;* and appointed his two sons executors, but made no residuary bequest. By a codicil to his will, dated in January, 1871, after varying the amounts of several of his legacies, and reciting that he had bequeathed a yearly payment of £16 to his granddaughter, *Laura Travers*, the testator continued: "Now I do hereby order and direct that the said yearly payment of

V.-C. M. 1872 TRAVERS v. TRAVERS.

£16 be paid by the said *N. Travers*, *H. Strickland*, *E. Falkner*, *J. Fallner*, and *F. Travers*, together with all expenses attending the proving of my will and codicil and administration and winding-up of my estate, in equal proportions, according to the value or estimated value of the property and interest which they respectively derive under the trusts of my said will and this codicil, it being my will and desire that no part of the said expenses shall be borne by the residuary legatees of my will, but that the said residuary legatees shall, in contradistinction to the usual rule applicable to such cases, receive the residue of my estate without any deduction being made from the same for the said expenses, but the said expenses shall be charged as aforesaid. And I do hereby ratify and confirm my said last will and testament in all other respects except as hereinbefore mentioned."

The suit was instituted for administration of the testator's estate, and a question was raised upon further consideration whether the executors took the residue of the estate beneficially, or whether it was undisposed of and went to the next of kin of the testator.

Mr. *Glasse*, Q.C., and Mr. *Bathurst*, for the executors:—

We submit that the executors take the residuary estate left by the testator. By the codicil to his will the testator has distinctly stated that his residuary legatees shall receive the residue of his estate without any deduction, clearly shewing that he intended to dispose of his residue under the will. It is true he has not by his will disposed of the residue in distinct terms; but he has appointed his two sons his executors, and he must have supposed that the executors would take the residue without any special words to that effect. This would in fact have been the case before *Lord St. Leonards Act* (11 Geo. 4 & 1 Will. 4, c. 40), and we submit that the testator, by his codicil, has sufficiently indicated an intention that the executors are to take, which is all that is required by the Act.

Mr. *Colton*, Q.C., and Mr. *Ferrers*, for the Defendants.

Mr. *Dryden*, for the persons who would take under an intestacy.

SIR R. MALINS, V.C.:—

It is agreed on all hands that the testator by his will does not dispose of his residuary estate. He appoints his two sons executors, and before the statute of 11 Geo. 4 & 1 Will. 4, c. 40, that would have passed a beneficial interest in the residue. Formerly, where executors were appointed and no disposition made of the residue, the executors took a beneficial interest in the residue unless a contrary intention was expressed; but since the statute, if there is no disposition of the residue the executors take the residue for the benefit of the next of kin, unless a contrary intention is expressed. I am bound to conclude that the testator knew what the law was, and that the appointment of executors had no operation as to the beneficial disposition of the residue. This being the case, he makes a codicil to his will, and it is plain from the terms of that codicil that he was under the impression that he had disposed of the residue; but I cannot attribute to him an intention to give anything to the executors, because to do so would be repugnant to the law. He, no doubt, thought he had appointed a residuary legatee, and it would be mere conjecture to suppose he meant the executors to be residuary legatees. The effect of the codicil is to exonerate the residuary legatees from payment of all expenses attending the proving of the will and administration and winding-up of his estate; therefore, while making no provision for the residue by will, the codicil leaves the matter in the same position, and there is no disposition of the residue.

I come, therefore, to the conclusion that there is an intestacy under the will and codicil as to the residuary estate.

Solicitor for the Plaintiff: Mr. *J. Rae.*

Solicitors for the Defendants: Messrs. *Philp & Behrend.*

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May 22;
June 26

In re TRUEMAN'S ESTATE.

HOOKE *v.* PIPER.

[1871 T. 119.]

Winding-up—Costs of Liquidation—Personal Liability of Liquidator.

16 Ch D. 130-6

A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him in the affairs of the liquidation for any of the costs of such liquidation.

ADJOURNED SUMMONS upon a claim by Messrs. *Hooke & Street*, solicitors, for their bill of costs against the estate of *Joseph Trueman*, deceased, one of the directors and the chairman, and also one of the liquidators under a voluntary liquidation of the *Madras Coffee Company, Limited:*

(*a.*) In relation to winding up the company and proceedings before the liquidators, under the resolution to wind up voluntarily.

(*b.*) Costs of directors in opposing a petition to wind up under the direction of the Court, with costs of action for recovery of papers of the company.

(*c.*) Costs in Chancery suit of *Rayner* v. *Madras Coffee Company* and the directors, *Trueman, Cockerell, Holland*, and *Hills.*

The company was formed in 1861, and from 1866 *Trueman*, who was one of the original subscribers and directors, acted as chairman. Mr. *Hooke*, of the firm of *Hooke & Street*, solicitors, was a shareholder (fully paid-up), and the business on behalf of the company in respect of which the present claim was made began in November, 1867.

In December, 1868, *Hooke* was instructed by *Trueman* to call a meeting to consider a proposition for winding up voluntarily, and forming a new company to purchase the estates of the company in *India.* The proposition fell through, from the presentation of a petition for a compulsory winding-up by *Rayner*, a former manager of the company, and others. The petition, which was opposed on behalf of the directors, was dismissed with costs. A bill was soon afterwards filed by *Rayner* against the company and the directors

personally, to establish his claims and to restrain the sale of the estates to the proposed new company. On being informed by *Hooke* of the filing of this bill, *Trueman* wrote to him on the 20th of February, 1869: "I am much obliged by your note of yesterday; and I now request and authorize you to act on my behalf with regard to the matter therein mentioned;" and again, on the 1st of March, 1869: "I suppose we must now fight *Rayner* to the death, as he, or rather his advisers, do not seem amenable to reason." The bill was ultimately dismissed with costs. On the 22nd of March, 1869, a resolution for a voluntary winding-up was passed and confirmed, and Messrs. *Trueman* and *Kimber* were appointed liquidators. Under the liquidation *Rayner* brought in a claim, which was contested by the liquidators and disallowed. On the 2nd of May, 1871, *Trueman* died.

No proceedings had been taken under the liquidation since *Trueman's* death, there being no uncalled capital and no assets or funds to meet the expenses of further proceedings.

After *Trueman's* death, his three co-directors had agreed to pay sums amounting to £180 towards Messrs. *Hooke's* bill of costs, leaving a balance of over £300 to be recovered from *Trueman's* estate. The executors of *Trueman* objecting to pay more than was paid by the other directors, Messrs. *Hooke & Street* had commenced a suit by summons for the purpose of recovering their bill of costs from the estate of *Trueman*, and their claim now came on by adjournment from Chambers.

The material question was, whether the estate of *Trueman* was liable for the costs of the liquidation as distinguished from the costs of opposing the petition for a compulsory winding-up and the costs of defending the suit against the company and the directors personally, in respect of which *Trueman* had given a retainer to *Hooke*.

Mr. *Mackeson*, Q.C., and Mr. *Dauney*, in support of Mr. *Hooke's* claim, contended that *Trueman's* estate was primarily liable for the costs of the business done for the company, and for which, as one of the directors personally interested, he had given a written retainer. The costs of the liquidation were covered by that retainer, and could not be distinguished from the costs of resisting the

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petition to wind up and defending the suit against the company and the directors personally.

[They cited *In re Massey* (1); *Companies Act*, 1862, sect. 144.]

Mr. *Kay*, Q.C., and Mr. *Marten*, for the representatives of *Trueman* :—

Liquidators cannot be made personally responsible for any of the costs of the liquidation. They are not trustees for creditors, so as to exclude the operation of the *Statute of Limitations*, and the assets do not vest in them, but the property remains in the company, subject to the control of the Court exercised as a rule through the liquidator: *In re General Rolling Stock Company* (2). Even assuming that any liability attached to them personally, *Trueman* was not the sole liquidator, and it is a bare joint liability which will not survive, and no creditor's suit can be maintained against the estate of one of the liquidators after his death: *Clarke* v. *Bickers* (3); *Richardson* v. *Horton* (4); *Rawstone* v. *Parr* (5); *Other* v. *Iveson* (6). In any case the surviving liquidator is a necessary party, and the claim cannot be entertained in his absence: *Hills* v. *M'Rae* (7).

[They also cited *In re Audley Hall Cotton Spinning Company* (8); *In re Marlborough Club Company* (9).]

Mr. *Mackeson*, in reply.

Sir James Bacon, V.C., after stating the question, continued :—

As to the retainer, it is unquestionable that Messrs. *Hooke & Street* were retained by Mr. *Trueman* personally as his solicitors in his character of Defendant to the suit of *Rayner* v. *Madras Coffee Company, Limited*, and for all the costs so incurred his estate is liable. The question about the winding-up petition is somewhat different, and rather more difficult. When the petition was pre-

(1) Law Rep. 9 Eq. 367.
(2) 20 W. R. 621.
(3) 14 Sim. 639.
(4) 6 Beav. 185.
(5) 3 Russ. 424, 539.
(6) 3 Drew. 177.
(7) 9 Hare, 297.
(8) Law Rep. 6 Eq. 245.
(9) Law Rep. 6 Eq. 519.

sented it was resolved to oppose it, and opposed it was for the company, but it was also opposed for Mr. *Trueman*, who writes in March, 1869:—"We must fight *Rayner* to the death." Counsel was applied to, and, in consequence of his advice, a separate brief was delivered. For so much of the business Messrs. *Hooke & Street* have, I think, a charge against Mr. *Trueman's* estate, whatever the amount may be. As to the charges for the liquidation, there is no ground upon which Mr. *Trueman's* estate can be charged with any part of them. I take the meaning of the winding-up Acts to be, that when there is a voluntary liquidation by resolution of the company, and a liquidator is appointed, the only effect is to displace the directors, and to put into the hands of the liquidator the winding-up which has been resolved upon, but still as the agent of the company, having no personal interest, but merely to execute whatever is necessary in order to effect the winding-up, and that there is nothing in the nature of the transaction upon which the liquidator can be said to incur any personal responsibility. It is clear to me, beyond the possibility of doubt, that he never does incur any liability; that it is not his intention, nor the intention of any solicitor whom he employs in that business, ever to assert that there did exist any personal liability between them. The business of the liquidator is to realise and administer the assets: if there are enough, well and good; if not enough, people must go unpaid. The solicitor knows that that is the end and object of the appointment of the voluntary liquidator. The liquidator has no interest in the matter, except simply for his remuneration, which is to come afterwards; he has no right or interest in any particle of the assets he is to realise, receive, and distribute, and to do the best he can with; and the solicitor undertakes the employment with a perfect knowledge on the subject. The Act of Parliament which provides that the funds of the company, the assets, shall be the source from which the payment shall be made does not in terms contemplate the possibility of the assets being insufficient, nor was it necessary that it should, because if that happens somebody must go unpaid. The clause referred to (sect. 144) points out the order and degree in which the costs and other charges shall be paid, putting the remuneration of the official liquidator last. Upon the reason of the thing, upon the terms of the Act of Parliament, in my opinion no

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doubt can possibly exist. The case cited, *In re Massey* (1), in my opinion disposes of the matter conclusively.

[His Honour, after referring at length to that case, and the judgment of Lord *Romilly*, continued:—]

I take that case, then, to have decided, in the plainest manner possible, that the credit is given to the assets; that an official liquidator incurs no personal liability, except by means of some contract, and that the solicitor is entitled to be paid out of the assets of the company, whether the liquidator is dead or alive. His exertions entitle him, when there are assets, to be paid every farthing of the costs that have been incurred in the liquidation, but he has no right whatever to recover costs against the liquidator. His only right against the liquidator is, that he is entitled to be paid his costs in priority to any remuneration that the liquidator might otherwise claim.

With these observations, I think it is fair, under the circumstances, that the claim made against *Trueman's* estate should be changed in some shape. A bill of costs should be made out, which should contain no items for which Mr. *Trueman* was not liable, or for which, if he were now alive, the solicitors could not bring an action against him personally. For all that they have done for him personally they are entitled to be paid out of his estate; all that they have done for him merely in his capacity of a director they have no claim for against his estate. The defence to the Chancery suit, and the opposition to the petition for winding up, are matters which, when the costs come to be taxed, will be properly within the province of the Taxing Master. But as to the costs of the winding-up, I am of opinion that the claim is wholly without any foundation, and that Messrs. *Hooke & Street*, the solicitors, are entitled to claim nothing personally against the estate of Mr. *Trueman* in respect of any business done for Mr. *Trueman* from the time when he was appointed one of the two liquidators.

The matter will be referred back to Chambers, with an intimation of opinion that Mr. *Trueman's* estate is liable for the costs of his personal defence of the suit and his personal opposition to the petition to wind up, but not for any other part of such defence or opposition, nor for any of the costs of the solicitors in the winding-up, nor costs of business of the company.

(1) Law Rep. 9 Eq. 367.

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June 26. A difficulty having arisen before the Registrar in drawing up the minutes of the order, the case was again brought before the Court, and in the result the following directions were given :—

1. That the estate of *Trueman* is liable to the costs of the personal defence to the suit of *Rayner* v. *Madras Coffee Company* on his separate retainer referred to in the affidavit of *Hooke*, and is not liable for any other costs of defence to the said suit.

2. That the estate is liable for testator's costs of his personal opposition to the petition to wind up the company compulsorily, and is not liable for any other costs of the opposition to such petition; (3) is liable to the costs of the private business, if any transacted for the testator personally; (4) is not liable for any of the costs of the business of the company or for any of the costs of the liquidation of the said company.

Solicitors: Messrs. *Hooke & Street;* Messrs. *Thomas & Hollams.*

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[1871 F. 14.]

Will—Construction—Absolute Interest—Indefinite Failure of Issue—Remoteness.

Testator, by will made in 1821, after a gift of leaseholds to his daughter *E.*, gave all the remainder of his property whatsoever to his wife *D.*, the income to her for life, and at her death unto *E.*, for her own benefit and her children, or one only child if she should have any (all that was given to *E.* being for her own benefit, and not to be subject to the debts, control, or disposition of any husband she might marry); but if *E.* should die without issue the leaseholds were to be enjoyed by *D.* for life, and at her death to his sister *S.* for her life, and at her death, together with all that was left to *D.* for her life, to be equally divided between all the grandchildren of *S.*

E. died without having had a child :—

Held, that *E.* was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to *D.*'s life interest, and that the limitations over, if *E.* "should die without issue," were void for remoteness.

JAMES NOKES, by his will, dated the 20th of December, 1821, after giving certain pecuniary legacies, proceeded as follows :—

"I give unto my daughter *Elizabeth Harris Nokes* all my two-

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third shares, right, title, and interest in a leasehold estate held under the Governors of *Christ Hospital*, in the parish of *Saint Leonard's, Shoreditch, Middlesex.* I give and bequeath unto my wife *Elizabeth Nokes* all my rights and title to an income arising from the purchase of land tax on her estates in the parish of *Saint Mary*, on the level of *Romney Marsh*, and in the parish of *Shoulden*, both in the county of *Kent*, and her heirs for ever. I give unto my wife *Elizabeth Nokes* all my household goods, ready money, and whatsoever is found in my house at the time of my decease, for her own use and benefit, all the remainder of my property, freehold and leasehold estates, money in the funds, or of whatsoever description it may be, after all my just debts and the proving of this my will are paid; the rents and interest unto my wife *Elizabeth Nokes* for her life, and at her decease unto my daughter *Elizabeth Harris Nokes* for her own benefit and her children, or one only child, if she should have any. All that is willed unto my daughter *Elizabeth Harris Nokes* to be under her own care and for her own benefit, and not to be subject to the debts, engagements, control, or disposition of any husband, if she should marry, but her receipt to be a sufficient and the only proper discharge notwithstanding her coverture. Now, if it should so happen that my daughter *Elizabeth Harris Nokes* should die without issue, then my will is, that the leasehold estate in *Shoreditch* shall be enjoyed by my wife *Elizabeth Nokes* for her life, and at her decease to my sister *Sarah Church* for her life, and at her decease, together with all that is left to my wife *Elizabeth Nokes* for her life, to be equally divided between all the grandchildren of my sister *Sarah Church.*"

The testator died on the 25th of February, 1825. His widow, *Elizabeth Nokes*, died on the 26th of October, 1837, having, by her will, appointed *Elizabeth Harris Nokes* sole executrix and residuary legatee.

Elizabeth Harris Nokes, the only child and sole next of kin of the testator, was married in the testator's lifetime to *Thomas Rippon* (whom she survived), and died on the 10th of November, 1870, without having had issue.

Sarah Church, the testator's sister, died on the 2nd of February, 1825. She had nineteen grandchildren, most of whom were born in the lifetime of the testator.

The Plaintiff, *J. C. Fisher*, and Defendant, *Elizabeth Webster*, as executor and executrix of Mrs. *Rippon*, were now, under the circumstances, the legal personal representatives of the testator. The question in the suit which was instituted for the administration of the testator's estate, was whether Mrs. *Rippon* took an absolute interest in the testator's residuary estate, or a life interest only, so that on her death without issue the grandchildren of *Sarah Church* were entitled, in which question was involved that of whether the gift over, if *E. H. Nokes* should die without issue, was void for remoteness.

Mr. *Bristowe*, Q.C., and Mr. *R. O. Turner*, for the Plaintiff.

Mr. *Eddis*, Q.C., and Mr. *Whitehorne*, for *Elizabeth Webster*, legal personal representative, and a beneficiary under the will of Mrs. *Rippon*:—

First: The effect of the will was to give to *Elizabeth Harris Nokes* and her children an immediate estate as joint tenants: *Newill* v. *Newill* (1); *De Witte* v. *De Witte* (2). Secondly: The gift over upon the failure of issue of *Elizabeth Harris Nokes* is void for remoteness, and she took the absolute interest, as in the case of a will (as this) made before the 1st of January, 1838, such a bequest over, whether of real estate or of personalty, is taken to mean after a general failure of issue, and is not confined to a failure of issue at the death of *Elizabeth H. Nokes*: *Candy* v. *Campbell* (3) (affirming *Campbell* v. *Harding* (4)); *Beauclerk* v. *Dormer* (5); *Pride* v. *Fooks* (6); *Simmons* v. *Simmons* (7).

Mr. *Swanston*, Q.C., and Mr. *Shebbeare*, for the grandchildren of *Sarah Church*, contended that the gift to *Elizabeth Harris Nokes* was cut down to a life interest, with remainder to her children, by the subsequent words, if she "should die without issue": *Mason* v. *Clarke* (8); *Jeffery* v. *De Vitre* (9); *Froggatt* v. *Wardell* (10); and, secondly, that the gift over was not too remote, as the words, if

(1) Law Rep. 7 Ch. 253.
(2) 11 Sim. 41.
(3) 2 Cl. & F. 421.
(4) 2 Russ. & My. 390.
(5) 2 Atk. 308.
(6) 3 De G. & J. 252.
(7) 8 Sim. 22.
(8) 17 Beav. 126.
(9) 24 Ibid. 296.
(10) 3 De G. & Sm. 685.

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she "should die without issue," must be construed referentially, having regard to the whole scope and object of the will, and did not mean a failure of issue generally, but were confined to the death of *E. H. Nokes* without children: *Robinson* v. *Hunt* (1); *Cormack* v. *Copous* (2); *Bryan* v. *Mansion* (3).

Mr. *Kay*, Q.C., and Mr. *Warmington*, for other parties in the same interest:—

Dying without issue is confined to a failure of issue at the death of the first taker, for the persons to whom it is given over were then in existence, and life estates only were given to them: *Roe* v. *Jeffery* (4). The unwillingness of the Court to extend the artificial construction of an indefinite failure of issue to a gift of personal estate is shewn by the different construction applied to both descriptions of property in the same sentence: *Forth* v. *Chapman* (5). The gift must therefore be construed as giving an absolute interest to *E. H. Nokes*, subject to a contingent executory bequest in favour of Mrs. *Church's* grandchildren to take effect upon the event which has happened of the death of *E. H. Nokes* without children living at her death: *Greenwood* v. *Verdon* (6); *Parker* v. *Birks* (7); *Coltsmann* v. *Coltsmann* (8); *Thompson* v. *Fisher* (9).

Mr. *Ford*, for other parties, referred to *Dawson* v. *Bourne* (10); *Cormack* v. *Copous* (11).

Mr. *Eddis*, in reply:—

In re Rye's Settlement (12) shews that, notwithstanding *Roe* v. *Jeffery*, the creation of life estates after the failure of the issue would not be sufficient to restrain the meaning to failure of issue at the death of the first taker: *Hawkins* on Wills (13). The words "die without issue" must have their legal signification, that is, death without issue generally, unless there are expressions or

(1) 4 Beav. 450.
(2) 17 Ibid. 397.
(3) 5 De G. & Sm. 737.
(4) 7 T. R. 589.
(5) 1 P. Wms. 663.
(6) 1 K. & J. 74.
(7) 1 K. & J. 156.
(8) Law Rep. 3 H. L. 121.
(9) Ibid. 10 Eq. 207.
(10) 16 Beav. 29.
(11) 17 Ibid. 397, 402.
(12) 10 Hare, 106, 111.
(13) Page 210.

circumstances from which it can be collected that they are used in a more confined sense: *Barlow* v. *Salter* (1).

June 12. SIR JAMES BACON, V.C.:—

In this case a point of construction arose upon the will of the testator *James Nokes*, dated the 20th of December, 1821; the question being whether a gift over after the death of his daughter *Elizabeth*, without issue, failed as being too remote.

[His Honour, after stating the will, continued:—]

The testator died in March, 1825, leaving his widow and his daughter surviving him. The widow died in 1837, and the daughter in November, 1870, without ever having had a child. *Sarah Church* had nineteen grandchildren, and the question therefore lies between the legal personal representatives of the daughter and the grandchildren of *Sarah Church*. On the part of the daughter's representatives it is argued that the gift of the leasehold in *Shoreditch* to the daughter being in absolute terms, there can be no doubt as to the interest which she took under that bequest—that the gift of the residue after the death of the widow "for her own benefit and her children, or one only child if she should have any," would have created a joint tenancy between her and her children if she had had any, and that in the events which happened she became entitled absolutely to that residue; and this being so, that the gift over if she should "die without issue," is void for remoteness, and her absolute right to the residuary estate of the testator remains unaffected. On the part of the grandchildren of *Sarah Church* this claim is disputed, and it has been argued that the bequest of the residue in favour of the daughter and her children, if she should have any, together with the provision for her separate use, plainly indicates that it was the intention of the testator that the residue should be so settled as to give her only a life interest, and that the Court is always desirous of taking hold of any circumstance which will enable it to give effect to such an intention; and several cases were referred to which establish that principle. It was further insisted that the gift over of life estates

(1) 17 Ves. 479.

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to the testator's widow and to his sister prevented the limitation from being too remote; and upon that point reliance was placed upon *Roe* v. *Jeffery* (1). The case was very fully and ably argued, and many instances were referred to in support of the propositions laid down on either side.

In all questions of construction, the only safe guides to their determination are to be derived from the decisions which have established principles clear and certain, and although an almost infinite variety of cases may readily be found in which some apparent analogies may be traced, or somewhat similar circumstances are presented, nothing would be more dangerous than to adopt them as establishing or interfering with the rules which have affixed certain determinate meanings to technical expressions: *Towns* v. *Wentworth* (2). It cannot be said that the questions which are here raised are without difficulty, but I think the difficulty is removed by the cases in which I find such rules to have been established upon authority by which I am at the same time directed and bound. In the recent case of *Newill* v. *Newill* (3), the Lord Chancellor had to deal with a bequest in terms very similar to those which occur in the will before me, the gift being to the testator's wife "for the use and benefit of herself and of all my children." The suggestion that the Court will take hold of slight circumstances for the purpose of effecting a settlement on a mother and her children was the principal subject of consideration.

The Lord Chancellor recognised the principle, and although not wholly approving of it, expressed no unwillingness to adopt it if the circumstances of the case had required it, but he said, "What is there in the joint tenancy between her and her children more inconsistent with her having the management of the whole fund than there is in a tenancy for life with remainder to her children?"

Nor can I say that the declaration of the testator in the present case, that such interest as his daughter was to take should be protected against any interference by her husband, had the effect of qualifying or diminishing the amount of that interest, or as leading to the conclusion that he meant anything other than his words

(1) 7 T. R. 589. (2) 11 Moo. P. C. 526.
(3) Law Rep. 7 Ch. 253.

express. It appears to me, therefore, clear that, according to the plain construction of the will, the daughter of the testator was entitled absolutely, as well to the leasehold estate specifically bequeathed to her as to the residue of the testator's estate, subject only to her mother's life interest. The other question is whether the gift over upon her dying without issue can take effect; and upon this the general rule of law is too clear to be disputed, and indeed it has not been disputed in the course of the argument. In *Campbell* v. *Harding* (1) most of the leading authorities on the point were fully examined and commented upon by the Lord Chancellor. The question there arose upon a will by which the testator had given to *Caroline Harding* a share of stock, "but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time." The will further contained a provision for her maintenance, and a declaration that if she married it must be with the consent of the guardians appointed, and the property to be solely settled upon herself and children. The Vice-Chancellor had decided, upon the original hearing, that *Charlotte Harding* took an absolute interest in the stock, and that the bequest over being limited after a general failure of issue was void. Upon the hearing of the appeal, besides the arguments derived from the will that the testator ought to be held to have directed a settlement, the case of *Roe* v. *Jeffery* (2) was, among others, relied upon. That case is spoken of by Sir *E. Sugden*, in arguing for the Respondent, as an anomalous case, and as one which would perhaps hardly be followed out at the present day. The Lord Chancellor examines it with great minuteness, and, without impugning its authority, points out the grounds upon which the decision there might be supported as an executory devise, and particularly that the words of the gift over there were, in case the first taker should "depart this life and leave no issue"—a distinction from the present case so plain as to prevent the application of *Roe* v. *Jeffery*, even if the weight of its authority had been less questionable than it has been contended to be. The decision of the Vice-Chancellor having been affirmed on this appeal, the case was afterwards carried to the House of Lords, and is there reported under the title of *Candy* v.

(1) 2 Russ. & My. 390. (2) 7 T. R. 589

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Campbell (1). In the judgment there given (the appeal being dismissed), the Lord Chancellor adheres to the opinion he had expressed in the Court of Chancery, and states the rule of law in very explicit terms (2). "The law was formerly doubtful as applied to cases of this description, but it is now quite settled that if a gift is made to *A.*, and on failure of issue or if *A.* die without issue, then to *B.*, such a bequest over, whether it be of real estate or of personalty—being taken in the legal signification of the terms to mean after a general failure of issue, a failure of issue at any time—is void for remoteness, and the absolute interest is given to the first taker unless there appears something in the will indicating a different intention. It is true, as has been urged in the argument at the bar, that you are not, in construing the bequest, restricted to that part only of the will; but you may, for the purpose of collecting the testator's intentions, look to other parts of it, and to the whole context."

Now, in this state of the authorities, it appears to me that the Court has nothing to do but to apply the rule of law which is thereby clearly and conclusively established. I am therefore required to declare, and do declare, that the legal personal representatives of the testator's daughter are entitled to that residuary estate which has been ascertained by the proceedings in the cause.

Solicitors: Messrs. *Thompson & Groom*; Mr. *Warmington*.

(1) 2 Cl. & F. 421. (2) 2 Cl. & F. 427.

LIPPARD *v.* RICKETTS.

V.-C. B.
1872
June 29.

[1867 L. 205.]

Administration—Order that Costs should be added to a Security and charged upon the Property comprised therein—Interest on Costs.

By orders of the Court, made in 1862 and 1863, certain costs to which a Petitioner was entitled were directed "to be added to the moneys secured to him" by a deed, and it was ordered that the same should "stand as a charge upon" the property comprised in the deed. The deed referred to was a grant, in consideration of £400, of an annuity of £40 a year for lives to the Petitioner, secured by the covenant of the grantor, and by a charge of the annuity upon certain specified real and personal estate. The order said nothing about interest:—

Held, independently of the *Attorneys Act*, 1860, that inasmuch as the costs were an equitable charge, they bore interest at 4 per cent.

FURTHER CONSIDERATION.

This suit was a sequel to another of *Scaping* v. *Cheetham*, instituted for a partition of the estate of *Matthew Dyer*, the testator in the cause. After the rights of the parties had been declared in *Scaping* v. *Cheetham*, the bill in this suit was filed to obtain a sale instead of a partition.

On the 4th of May, 1870, the Chief Clerk made a certificate in this suit, in a schedule to which he set forth "amongst what persons and in what shares the moneys to arise from any sale of the said estates ought to be divided." Amongst other entries in this schedule was one to the effect that *George Ricketts*, and *Sarah* his wife (formerly wife of *George Scaping*), were entitled to three thirty-second parts of the proceeds of sale, subject to a settlement, subject also to an indenture purporting to be an appointment under the same settlement in favour of *Thomas Maitland*, and subject to two several orders in *Scaping* v. *Cheetham*, dated the 29th of July, 1862, and the 25th of July, 1863, whereby certain costs of *Thomas Maitland* were ordered "to be added to his security, and to stand as a charge upon" the share.

By the appointment, which was dated the 29th day of July, 1846, and made between *George Scaping* and *Sarah* his wife of the one part, and *Thomas Maitland* of the other part, in consideration of

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£400 by *Maitland* paid to *George Scaping* and *Sarah* his wife, they, *Scaping* and his wife, by virtue of a power contained in the settlement, appointed, granted, and confirmed to *Maitland*, his executors, administrators, and assigns, for and during the lives of *T. Maitland* and three other persons, an annuity of £40, free from deduction, "to be issuing and payable out of and from, and to be charged and chargeable upon, all that part or share of them the said *George Scaping* and *Sarah* his wife, or either of them, of and in" the hereditaments comprised in the schedule, "and all and singular other the real and personal estate of which the said *Matthew Dyer*, the testator, died seised, and now of or belonging to the said *George Scaping* and *Sarah* his wife, or either of them, and of and in the appurtenances;" to be payable and paid to him and them by four equal quarterly payments, on the 29th of October, 29th of January, 29th of April, and 29th of July in every year; with powers of distress and entry. By the same deed *G. Scaping* and *Sarah* his wife granted their share of and in the hereditaments comprised in the schedule, and of and in all other the freehold hereditaments of the testator, charged with the said annuity, to *Maitland*, his executors, administrators, and assigns, for ninety-nine years, if the same four persons should so long live, upon trust to secure the same annuity; and they also appointed and assigned their share in the testator's copyholds, leaseholds, and personal estate, to *Maitland*, his executors, administrators, and assigns, upon the like trust. By the same deed *George Scaping* covenanted with *Maitland* during the four lives, or until redemption or repurchase, to pay the same annuity in manner above mentioned; and it was provided that if *George Scaping* should give six months' previous notice, or in lieu of notice should pay to *Maitland* half a year's payment in advance of the annuity, and all arrears then due, and also "all such costs, charges, and expenses, as shall or may be for the time being due or payable unto the said" *Maitland*, and upon payment by *Scaping*, his heirs, executors, or administrators, to *Maitland*, his executors, administrators, or assigns of £420, the annuity, and the powers and remedies thereinbefore given for enforcing payment thereof, and the term of years and covenant should thereupon cease and determine, and *Maitland* should reconvey and reassign.

The wording of the order so far as material, was:—"And that the Petitioner" (*Maitland*) "be at liberty to add such taxed costs to the moneys secured to him by the" said indenture, "and that the same do stand as a charge upon" the said share.

The only question now was whether *Caroline Maitland*, the widow and legal personal representative of *Thomas Maitland*, was entitled to interest upon the sum of taxed costs so ordered to be added to the moneys secured by the annuity deed.

Mr. *Kay*, Q.C., and Mr. *T. Stevens*, for Mrs. *Maitland*:—

It seems almost a matter of course that interest should be added to the amount secured. Had this been a sum of money secured by mortgage instead of an annuity, no question could have arisen.

In *Wainman* v. *Bowker* (1) a party to a cause had been ordered to pay money into Court, and was also held entitled to be indemnified. Having so paid, and having had recourse to the indemnity fund, he was held entitled to interest on his payments at 4 per cent. In *In re Kerr's Policy* (2) it was held that a simple contract debt secured by deposit will (without evidence to the contrary) carry interest at 4 per cent.

Mr. *Eddis*, Q.C., and Mr. *F. G. Bagshawe*, for Mr. and Mrs. *Ricketts*:—

There is no power in the Court to give interest on costs in such a case as this. The 17th and 18th sections of 1 & 2 Vict. c. 110, apply only to costs payable from one party to another.

Then there is the 27th section of the last *Attorneys Act* (23 & 24 Vict. c. 127), passed in August, 1860, whereby a Judge is empowered to give interest on costs at £4 per cent. from the date of the certificate, and by sect. 28 to charge the costs on the property recovered. In this case the orders themselves provide for the charge, and supersede the statutory power. They say nothing about interest, merely directing that the costs be added to the moneys secured, and those moneys do not bear interest.

The cases cited do not bear on the point.

The question is, what is the security in this instance? It is

(1) 8 Beav. 363. (2) Law Rep. 8 Eq. 331.

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nothing more than the covenant of the grantor accompanied by a charge on the property.

Mr. *Langley*, for a party in a similar interest:—

The *Attorneys Act* of 1860 was passed for the benefit of solicitors only, not of parties to the suit: *Jenner* v. *Morris* (1).

Mr. *Amphlett*, Q.C., and Mr. *W. H. G. Bagshawe*, Mr. *Jolliffe*, Mr. *Haddan*, Mr. *W. A. Clark*, and Mr. *Angelo Lewis*, for other parties.

SIR JAMES BACON, V.C.:—

The only question is as to the interest on these costs.

In the years 1862 and 1863 certain costs of the annuitant had to be dealt with, and an order was made that the costs should be added to the moneys secured by the annuity deed, and that the same should stand as a charge on the property charged with the annuity. The effect of that is to increase the sum secured to a larger amount, and upon that larger amount, in my opinion, interest is payable.

That the Court has power under the Act of 1860 to direct the payment of interest on costs at the rate of £4 per cent. from the date of the certificate nobody can deny; but it is said that the Act of 1860 was passed only for the benefit of the solicitor, not of the client.

I think no question of that sort arises here. The costs are charged on the security by the express order of the Court. The effect of that order is to increase the amount charged on the security; and upon the sum so charged, I think, interest is payable.

In the case of *In re Kerr's Policy* (2) the Court seems to have proceeded on the theory that a debt secured by equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it seems to follow that, when the Court has once decided that there is a charge, the sum charged must bear interest.

The circumstance that the security in this instance is an annuity

(1) 11 W. R. 943. (2) Law Rep. 8 Eq. 331.

deed does not make any difference except this: it may have been thought that, as the consideration was £400 and the annuity was £40, the grant of the annuity was in substance a mortgage for £400 and interest at £10 per cent., and so that this sum of costs must be added to the £400, and bear the same rate of interest, namely, £10 per cent. also. But this would be a very circuitous mode of doing what might, if the Court had so intended, have been done much more simply, and it is sufficient to say that the orders here contain no direction of that kind. They simply make the sum a charge, without saying anything about the rate of interest.

The costs, therefore, must bear interest from the date of the certificate at 4 per cent., and Mrs. *Maitland* will have a stop order on the fund representing the share.

Solicitors: Messrs. *Watkins, Baker, & Baylis;* Messrs. *Slee, Ovans, & Bailey;* Messrs. *Walker, Twyford, & Belward;* Messrs. *Courtenay & Croome;* Mr. *Fowkes;* Messrs. *Labrow & Woodbridge;* Mr. *A. C. Lewis.*

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[1869 T. 121.]

Equitable Charge on Renewable Leaseholds for Lives—Renewal of Lease—Subsequent Purchase by Lessee of Reversion—Charge upon Reversion—Election—Marshalling of Securities.

In 1805 a lessee for lives, with proviso for renewal, charged the hereditaments (subject to his own life interest in part) with £1500, and, subject thereto, conveyed the premises in trust for his son, *W. W. T.*, the testator in the cause. In 1811 *W. W. T.* settled the premises, subject to the life interest in part, and as to the whole charged with the £1500, on himself, his wife, and eldest son; and further charged the same with £2000 for his younger children. In 1815, the tenant for life having died, *W. W. T.* executed deeds reciting (erroneously) that the whole of the £1500 charges had been paid off, and taking from the trustee (in breach of trust) a conveyance of the hereditaments to himself absolutely, freed from the £1500 charges; but there was no evidence that this deed was ever acted on. In 1818, the *cestuis que vie* having all died, *W. W. T.* obtained a renewal of the lease, but without prejudice to a question whether the lessee had not lost the right of compelling a renewal.

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In 1819 *W. W. T.* purchased the reversion in fee of the leaseholds, the latter not being merged. In 1838 *W. W. T.* was party to a deed whereby he recited that he had paid £1200, part of the £1500, but that when he did so he did not intend that the same should sink into or be extinguished in the premises. In 1845 he appropriated the remaining £300 to himself as part of his share in the estate of the *cestui que trust* thereof, who had died. By his will, after reciting to the like effect, he devised the hereditaments comprised in the deed of 1805, subject to all such incumbrances as the same might at his decease be subject to, and from the payment of which he exonerated his personal estate, to his son *T. T.* absolutely, subject to a further charge.

W. W. T. died in 1859. *T. T.* entered into possession and disputed his liability to pay either the £1500 or the £2000, but paid interest up to 1869 :—

Held, that the charges paid off were kept alive for the benefit of *W. W. T.*'s personal estate :

Held, also, that the renewed lease of 1818 was subject to the charges :

Held, also, that the reversion in fee, purchased in 1819, was subject to the charges :

Held, further, that if the reversion had not been so charged, *T. T.* could not have availed himself of the devise without giving effect to the testator's intention.

W. W. T. having, in 1845, mortgaged the hereditaments comprised in the deed of 1805 :—

Held, that if the above sums had been charged on the leasehold only, and not on the reversion, the mortgagees must have had recourse to the reversion first, on the principle of *Barnes* v. *Racster* (1).

Affirmed on appeal by L.J.L.R.8 Ch.870

MOTION FOR DECREE.

By an indenture of lease dated the 29th of September, 1795, in consideration of the surrender of a former lease for lives, and of the sum of £1230 paid as a fine on the granting of such former lease, and in consideration also of a sum of £205 paid by the then present lessee to the then present lessor, and of the rent and covenants thereinafter reserved, certain lands in the parish of *Grosmont*, in the county of *Radnor*, were demised by the Duke of *Beaufort* to *Thomas Trumper* (hereafter called the elder), his heirs and assigns, for three lives and the life of the survivor, at a yearly rent of £98 6*s.*; and the deed contained a proviso on the part and behalf of the Duke that if, at any time thereafter, within twelve months after the first death of any or either of the lives for which the premises were or thereafter should be granted, *T. Trumper* the elder, his heirs or assigns, should be willing or desirous to continue a perpetuity or right of renewal on the terms and conditions thereinafter mentioned, or to nominate and put in a new life or

(1) 1 Y. & C. Ch. 401.

lives in the room of the life or lives then dead, then and in such case or cases, and when and as often as it should so happen, the Duke, his heirs or assigns, would, on payment of £205 by *T. Trumper* the elder, his heirs and assigns, for each new life so to be nominated and put in within twelve months after every the first death of one of the three lives in the then lease, on the surrender or expiration of that lease as the case should be, and at the expense of the said *T. Trumper* the elder, his heirs and assigns, grant a new lease, determinable on the death of such new life or lives, and of the said other or others then in being, or on the deaths of three new lives so then to be nominated and put in, if the old ones should be all then dead, and so to continue such perpetuity or right of renewal on the said terms and conditions, and unto and in the said *Thomas Trumper* the elder, his heirs and assigns, for ever.

By an indenture dated the 12th of February, 1805, *Thomas Trumper* the elder assigned the lands comprised in the above lease to *Theophilus Beavan*, his heirs and assigns, for the lives of the *cestuis que vie* and the life of the survivor, upon trust as to the *Lawns Farm*, part thereof, to permit *William Walwyn Trumper* the elder (son of *Thomas Trumper* the elder), and his heirs, to hold and enjoy the same, he paying the rent of £98 6*s.*; and as to all the rest, upon trust to permit *Thomas Trumper* the elder to receive the rents for his life, and after his death, by mortgage or sale of the whole, or out of the yearly rents and profits thereof, to raise a sufficient sum for putting in a new life or lives for the purpose of continuing the lease; and in trust, by further mortgage, or by the rents and profits, to raise £1500, and pay the same as follows: £300 to *Winifred Hooper*; £300 to *Honor Trumper*; £300 to *Ursula Dorothy Perry*; £500 to *John Trumper*; and £100 to *Francis Walwyn Trumper*; and after the decease of *Thomas Trumper* the elder, and payment of the £1500, it was declared that the grant of the said premises should be made to *William Walwyn Trumper* the elder, his heirs and assigns.

By deeds of lease and release, dated the 3rd and 4th of July, 1811, indorsed on the same indenture, the conveyance thereby made, having been considered to be inoperative through a defect, was confirmed.

By indentures of lease and release, dated the 26th and 27th of

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July, 1811, executed in pursuance of an agreement made previously to the marriage of *W. W. Trumper* the elder and *Elizabeth* his wife, the hereditaments comprised in the deed of 1805, were conveyed by *W. W. Trumper* the elder to the use of trustees for the lives of the *cestuis que vie*, and the life of the survivor, subject as to all but the *Lawns Farm* to the life interest of *Thomas Trumper* the elder, and subject as to the whole to the trusts for raising the £1500, upon trust for *W. W. Trumper* the elder for life, and after his death upon trust for his wife for life, and subject thereto, and to the trusts for raising £2000 thereinafter contained, in trust for the Defendant *Thomas Trumper* (son of *W. W. Trumper* the elder), his heirs and assigns, when he should attain twenty-four; and it was declared that the trustees should, upon the death of *W. W. Trumper* the elder, or as soon after as occasion should require, by mortgage or sale, raise £2000 in trust for all the children of *W. W. Trumper* the elder (other than a child entitled to the hereditaments), as *W. W. Trumper* the elder and his wife should jointly, or as the survivor should by will appoint.

There were issue of the above marriage five children, *Thomas Trumper*, *William Walwyn Trumper* the younger, *Elizabeth Trumper*, *Mary*, afterwards wife of *Henry James Mills*, and *James John Trumper*.

In 1814 *Thomas Trumper* the elder died, whereupon *W. W. Trumper* the elder became entitled in possession to the hereditaments, subject as above.

In 1815 were executed two indentures of lease and release dated the 19th and 20th of June, which the evidence shewed to have been found in the depositories of *W. W. Trumper*, the testator, after his death, by his executors, of whom *Thomas Trumper* was one. The release was made between *T. Beavan* of the first part, *Winifred* and *Honor Trumper*, *Ursula Dorothy Perry*, *John Trumper*, and *Francis Walwyn Trumper*, of the second part, and *W. W. Trumper* the elder of the third part. It recited that *W. W. Trumper* the elder had "paid or otherwise satisfied" to the several parties of the second part the several sums of money payable to them respectively under the deeds of 1805 and 1811, "which they did thereby acknowledge," and that in consideration thereof they had agreed to join and concur with and to direct *T. Beavan* to convey

and assign in manner thereinafter expressed. It then witnessed that, in pursuance and performance of the said agreement, *Beavan*, with and by the privity and consent and direction of the several parties thereto of the second part, bargained and sold, aliened and released, and the parties thereto of the second part released the hereditaments comprised in the deeds of 1805 and 1811, to the use of *W. W. Trumper* the elder; freed and discharged from the uses, trusts, provisoes, and declarations contained in the deeds of 1805 and 1811, but subject to the rent and covenants in the lease.

On the 11th of May, 1818, a lease by way of feoffment, and duly perfected by livery of seisin, was executed by the Duke of *Beaufort* to *W. W. Trumper* the elder. The deed recited the former lease and the death of *T. Trumper* the elder, and that the survivor of the three *cestuis que vie* had died in January then last, and that *W. W. Trumper* the elder, having become entitled to the hereditaments, had, upon the dropping of the several lives respectively, requested the Duke to grant to him a renewal of the lease according to the covenant, "which the said Duke (being unwilling to admit his liability upon the said covenant) declined to do as a performance of the said covenant, and at the same time agreed to grant" to *W. W. Trumper* the elder a lease of the premises for the three lives thereinafter named in consideration of £615 as a fine, and that "the said *William Walwyn Trumper* agreed to accept such lease so to be granted (it being understood that the granting and acceptance thereof should not prejudice or conclude the rights of the said parties with respect to the said covenant, and that such proviso to that effect should be inserted as hereinafter expressed.)" The deed then contained a grant of a renewed lease of the same premises to *W. W. Trumper* the elder for three lives, and then followed the following proviso:—

"Provided always, and it is hereby expressly declared and agreed by and between the said *Henry Charles* Duke of *Beaufort* and *William Walwyn Trumper*, that the rights and liabilities of the said parties respectively in regard to the said recited covenant for renewal shall not be affected by the granting or acceptance of the present lease."

In about 1819 *W. W. Trumper* the elder purchased from the

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Duke the reversion in the hereditaments, and by indentures of lease and release dated the 20th and 21st of January, 1819, the same was conveyed in trust for *W. W. Trumper* the elder, his heirs and assigns, to be conveyed and disposed of as he or they should direct.

By a settlement, dated the 12th of October, 1838, made prior to the marriage of *Mary*, daughter of *W. W. Trumper* the elder and *Elizabeth* his wife, to *Henry James Mills*, and to which *Thomas Trumper* was party in the character of trustee, after reciting, amongst other things, that *W. W. Trumper* the elder had paid to *Honor Trumper* the £300, to *Ursula Dorothy Perry* the £300, to *John Trumper* the £500, and to *Francis Walwyn Trumper* the £100, secured to be paid to them at the expiration of twelve months from the decease of *Thomas Trumper* the elder, making together £1200, "being part of the said sum of £1500;" and that, notwithstanding the said lease and release of 1815 and the recitals therein contained, the sum of £300, in like manner secured to be paid to *Winifred Hooper*, then remained due and owing to her; and that *W. W. Trumper* the elder, "at the times he so paid the said several sums amounting to £1200, did not intend that the same should sink into or be extinguished in the hereditaments and premises on which the same were charged, but intended that the same should be a charge on the said hereditaments and premises, and be kept alive for the benefit of his personal estate," it was witnessed that in execution of the power reserved or given by the deed of the 27th of July, 1811, *W. W. Trumper* the elder and *Elizabeth* his wife appointed that £500, part of the £2000 directed to be raised by the last-mentioned deed, should immediately upon the execution of the then present indenture vest in and become the property of *Mary Trumper*, her executors, administrators, and assigns, but that the actual payment of the same should be postponed till the decease of *W. W. Trumper* the elder; and by the same deed *Mary Trumper* assigned the said sum of £500 to *Thomas Trumper* and *William Walwyn Trumper* the younger upon the trusts therein mentioned; and by the same indenture *W. W. Trumper* the elder also assigned the sum of £600, part of the aforesaid sum of £1500 directed to be raised by the deed of February, 1805, to the same trustees; and it was declared that they

should hold the said sums of £500 and £600 upon the trusts therein declared for the benefit of *Mary Trumper*, her intended husband, and their children.

In 1845 *Winifred Hooper* died, and her will was proved by *W. W. Trumper* the elder, her executor. The residuary legatee named in her will died in her lifetime; and the £300 payable to her under the trusts of the deed of February, 1805, became divisible amongst her next of kin, of whom *W. W. Trumper* was one.

By deed dated the 5th of November, 1845, the hereditaments comprised in the deed of 1805 were mortgaged by *W. W. Trumper* the elder to secure £4500, and the same hereditaments were, by the several parties therein named, including the children, other than Mrs. *Mills*, of *W. W. Trumper*, conveyed to the mortgagees, their heirs and assigns, "subject nevertheless to the said sums of £600 and £500," and subject to the equity of redemption.

In May, 1853, *Elizabeth Trumper* the elder died.

On the 9th of February, 1856, *W. W. Trumper* the elder made his will. After reciting, amongst other things, that he had out of his own moneys duly paid off and discharged the said several sums, amounting together to £1500, by the deed of February, 1805, directed to be paid to the persons above mentioned, and that the same sum was then existing as a charge on the hereditaments comprised in the same indenture, for his own absolute benefit, save as to the £600 assigned to the trustees of Mrs. *Mills*' settlement, the testator, in exercise of the power reserved to him by the deed of July, 1811, appointed that the sum of £1500 residue of the £2000 by the same deed directed to be raised should, immediately after his decease, go and belong to his children, *William Walwyn Trumper*, *Elizabeth Trumper*, and *James John Trumper*, in equal shares, absolutely. And as to the sum of £900 residue of the £1500 so charged on the hereditaments by the deed of 1805, and afterwards paid off by him as in the said will mentioned, the testator gave one moiety thereof to his daughter *Elizabeth*, and the other moiety upon certain trusts for the benefit of his other younger children and their issue. The testator then declared that, as to all his estate and interest whatsoever in the hereditaments comprised in the said indenture of lease of the 29th day of September, 1795 (the re-

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version in fee whereof he so purchased of the Duke of *Beaufort* as therein mentioned), and in all other, if any, the hereditaments comprised in such purchase, he disposed of the same as follows: First, he charged the whole thereof with the payment to the persons and in the manner therein mentioned of the sum of £500 and interest at 4 per cent. from his decease, and subject thereto and to all such mortgages or incumbrances as the same or any part thereof might at his decease be subject or liable to, and from the payment of which he declared that he intended his personal estate to be wholly exonerated, he devised the same to the use of his son *Thomas*, his heirs and assigns, for ever; and as to the sum of £500, the testator gave one moiety of the same to his daughter *Elizabeth*, and the other moiety in trust for his other younger children and their issue as therein mentioned; and the testator appointed *Thomas Trumper* and *William Walwyn Trumper* the younger executors of his will, and declared that such appointment of *Thomas Trumper* should not operate to release him from payment of any debt he might owe to the testator at his (the testator's) decease.

The testator died on the 23rd of December, 1859.

Up to the 23rd of June, 1869, interest on the said sums of £1500, £2000, and £500 was regularly paid by *T. Trumper*, but he had excused himself in various ways from paying the principal, and on the 5th of November, 1869, this bill was filed by *W. W. Trumper* and *Henry Thomas Mills* against *Thomas Trumper*, alleging that the lease was renewed by the testator in 1818 for the benefit of the persons entitled to or interested in the hereditaments therein comprised; that upon *Winifred Hooper's* death the testator, her father, accepted and appropriated the £300 payable to her as part of his share in her estate as one of her next of kin, and thereupon became entitled to the £300, the residue of the £1500, for his own benefit; and praying for declarations that the sums of £1500 charged by the deed of 1805, and £2000 charged by the deed of 1811, and £500 charged by the will, were respectively subsisting charges upon the hereditaments comprised in the deed of 1805 with interest at 4 per cent. from the last day of payment of interest, and that the sums of £600 and £500 comprised in the deed of 1838, being parts of the sums of £1500 and £2000 respectively, with interest at the rate aforesaid, were charges on the same

hereditaments in priority to the mortgage debt of £4500 and interest; and for an account and payment.

On the 18th of March, 1870, *Thomas Trumper* answered; setting forth for the first time the above-mentioned deeds of June, 1815, of which the Plaintiffs until then had no knowledge.

The Defendant relied upon these deeds as shewing that before June, 1815, the testator had paid off the whole of the £1500 to the parties entitled. He accordingly denied that the lease was renewed in 1818 for the benefit of anybody but the testator himself, inasmuch as all the trusts of the deed of February, 1805, had been then performed. He believed the recital in the settlement of October, 1838, to be erroneous; and submitted whether the testator could, after satisfaction of the covenant in the deed of 1805, keep alive the £1500, or any part of it, as a charge on his estates for the benefit of his personal estate, by a declaration of his intention to do so, made for the first time more than twenty-three years after the same had been paid. For the same reason he disputed the statement that the testator appropriated the £300 as part of *Winifred Hooper's* estate, and submitted that the £1500 was not a subsisting charge on the hereditaments, and, admitting that the £500 was well charged by the will, submitted whether the £2000, or any part thereof, was raiseable.

On the 19th of July, 1870, the bill was amended by making the mortgagees Defendants, and they answered in October following.

The bill was re-amended on the 17th of January, 1871, and, as re-amended, charged that whether the lease was renewed for the benefit of the parties interested or not, and even if the hereditaments therein comprised were released by the deed of 1815 from the £1500, the Defendant *T. Trumper* was bound to give effect to the whole will, and must either pay the £2000 and £1500 or give up the property given to him by the will for the benefit of the persons claiming the same.

When the deed of the 12th of February, 1805, was produced in Court three indorsements were found upon it. The first was an acknowledgment, dated "*Hereford*, 7th of November, 1826," that a sum of £300 ordered to be paid to *Ursula Dorothy Perry* was that day paid to *John Perry*, and signed by *Ursula Dorothy Perry* and another person, probably as witness. The second was a memo-

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randum stating that "on the 27th day of January, 1830, the principal sum of £300 (by the within mentioned deed directed to be paid to *Honor Trumper*, since deceased) together with all interest due thereon, was paid to *Winifred Hooper*, the sole executrix of the said *Honor Trumper*, by the within named *William Walwyn Trumper*; and the said *William Walwyn Trumper* doth hereby expressly declare that he does not intend the said sum of £300 to sink into or be extinguished in the hereditaments and premises on which the same was charged (and of which he is now seised of the inheritance in fee simple), but intends that the same shall remain a charge on the said hereditaments and premises, and be kept alive for the benefit of his personal estate." This memorandum was signed by both *William Walwyn Trumper* and *Winifred Hooper*, and the signatures were witnessed by Mr. *William Humfrys*, the testator's solicitor. The third was a memorandum dated the 2nd of January, 1838, signed *John Trumper*, acknowledging the payment to him by *William Walwyn Trumper* of the sum of £500, and all interest to the date.

Mr. *Amphlett*, Q.C., and Mr. *Blackmore*, for the Plaintiffs:—

The true construction of the deeds of 1805 and 1811 is, that the £1500 was charged on all the property, including the *Lawns* estate. [This, in the result, was not disputed.]

Then, after *W. W. Trumper* the elder had succeeded to the estate, come the lease and release of 1815. Our theory with regard to this transaction (which was clearly a breach of trust) is, that these deeds were prepared and executed in order to give *W. W. Trumper* more complete control over the property in negotiating with the Duke of *Beaufort*. However that may have been, they recite, contrary to the fact, that the charges were paid off, and they appear never to have been further used, and never to have left *W. W. Trumper's* possession. We say they are wholly inoperative now.

After the execution of the deed of 1805, it became the duty of *W. W. Trumper* the elder, as the lives dropped, to insist on the renewal of the lease, and to preserve the covenant. He neglected to do this, and accordingly, when the renewed lease was granted in 1818, the lessor was in a position to dispute his liability to renew as a matter of compulsion. But that neglect cannot prejudice

the rights of the Plaintiffs. It is now conceded that the trusts of the lease of 1795 would have attached to the lease of 1818, had that lease been duly renewed under the covenant.

Then comes the purchase by *W. W. Trumper* from the Duke of the reversion, which was conveyed to a trustee so as not to merge the term. We say that the trusts of the renewable term were thus fastened upon the reversion also. There is no precise authority; the only instances reported being those of a simple purchase by the lessee of the inheritance. But the question is glanced at in *Randall* v. *Russell* (1); *Evans* v. *Walshe* (2); and *Postlethwaite* v. *Lewthwaite* (3).

That the £1500 was intended to remain charged, and that *W. W. Trumper* the elder did not mean to make the reversioner a present of this sum out of his personal estate, is presumable: *Burrell* v. *Earl of Egremont* (4); and that the recital in the release of 1815 is erroneous, appears from, first, the indorsements on the deed of 1805; secondly, the recitals in the testator's will.

Even if the estate be not charged, *T. Trumper* must elect between these sums and the benefits bequeathed to him under the will *pro tanto*.

Mr. *Vaughan Hawkins*, for a Defendant in the same interest:—

So far as the law is settled with regard to the duties of trustees having discretionary powers of renewal, it is stated in *Lewin* on Trusts (5), and *Hill* on Trustees (6), referring to *Viscount Milsington* v. *Earl Mulgrave* (7); S. C. as *Viscount Milsintown* v. *Earl Portmore* (8), *Lock* v. *Lock* (9), and *White* v. *White* (10).

Mr. *Kay*, Q.C., and Mr. *Cookson*, for the Defendant *Thomas Trumper*:—

Supposing the freehold, *i.e.*, the reversion, to be charged as well as the leasehold, then, upon the principle of *Barnes* v. *Racster* (11), the leasehold must be resorted to first.

(1) 3 Mer. 190, 196.
(2) 2 Sch. & Lef. 519.
(3) 2 J. & H. 237.
(4) 7 Beav. 205.
(5) 5th Ed. 294.
(6) Page 438.
(7) 3 Madd. 491.
(8) 5 Ibid. 471.
(9) 2 Vern. 666.
(10) 5 Ves. 554.
(11) 1 Y. & C. Ch. 401.

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But we say the fee simple was never charged at all. Even if the renewal was obligatory upon *W. W. Trumper*, the reversion was not charged, at least not until he made his will: *Hardman* v. *Johnson* (1). Nor does the will effect a valid charge; it merely recites that there was a charge. There is no mention of the lease in the will at all; there is nothing to make a new or further charge. From this it follows that there can be no election.

There can be no account against us for back rents. The chargee, if he be one, should have taken his remedy by going into possession.

[They also cited *Sidmouth* v. *Sidmouth* (2); *Norris* v. *Le Neve* (3); *Earl of Clarendon* v. *Barham* (4).

Mr. *Villiers*, for the mortgagees.

Mr. *Amphlett*, in reply.

July 8. SIR JAMES BACON, V.C.:—

The bill in this suit is filed for the purpose of compelling the payment, out of estates of which the Defendant *Thomas Trumper* is the present owner, of three sums of £1500, £2000, and £500, and which sums are alleged to be charged on those estates. Several questions have been raised in the course of the argument, but the principal one turns upon the effect of the will of the late *William Walwyn Trumper*, which was made in 1856. At that time he was tenant for life, by virtue of a marriage settlement, of an estate in *Radnorshire*, called by the general name of *Grosmont*, held under a lease for lives from the Duke of *Beaufort*. The leasehold had been originally, and before the settlement of 1811, afterwards to be mentioned, charged with sums amounting to £1500. By the settlement a sum of £2000 was charged, subject to the life interest of the testator, for the benefit of the younger children of the marriage, over which sum he had a power of appointment, and which power, to the extent of £500, he had exercised in favour of his daughter, Mrs. *Mills*. He had paid off the £1500 (as the Plaintiffs allege for his own benefit, and intending

(1) 3 Mer. 347.
(2) 2 Beav. 447, 454.
(3) 3 Atk. 26, 38.
(4) 1 Y. & C. Ch. C88.

to keep it alive), and had assigned £600 (part of it) to trustees for the same daughter. He had also acquired the reversion in fee upon the determination of the lease then and now existing. By his will, in which he noticed these several estates and interests, having disposed of £900, the residue of the £1500 which he had paid off as before mentioned, he devised that reversion in fee and all his estates in *Radnorshire*, charged with the payment of the sum of £500 (the payment of which is sought by the present suit), to the Defendant *Thomas Trumper*, who was his eldest son. He died in 1859. Thereupon the last-named Defendant entered into possession of, and has ever since held, and still holds, the estates so devised to him. Interest has been paid by him from the death of the testator up to June, 1869. He now disputes his liability to satisfy the charges with the exception of the last-mentioned sum of £500, and whether he is so liable or not is the matter to be decided.

Although the main question in the suit may be thus shortly stated, its solution can only be arrived at by a consideration of the circumstances appearing on the pleadings, and which are somewhat complicated. It appears that in 1805 one *Thomas Trumper*, the grandfather of the Defendant of that name, was the owner of the lifehold estate before mentioned, renewable in perpetuity, and by a deed, dated the 12th of February in that year, the estate was conveyed to *Theophilus Beavan* upon trust, as to a part of the premises demised called *The Lawns*, for the testator, and as to all the rest of the premises, in trust for *Thomas Trumper* for life, and after his death upon trust to raise out of the whole of the estate the renewal fines on putting in new lives, and also to raise £1500 (which appears to have been a sum that *Thomas Trumper* was liable to pay), and to pay the same to the several persons and in the several amounts there mentioned; and subject to these trusts the entirety of the estate was to be granted to *W. W. Trumper*, the testator, his heirs and assigns. This conveyance being in form defective, the defect was cured, and the grant was confirmed by deeds of lease and release, dated in July, 1811, whereby the legal estate was duly conveyed to *Theophilus Beavan* upon the trusts declared by the former deed.

Subsequently, and in the same year, 1811, a settlement was

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executed whereby the same premises were conveyed by the testator to trustees for the lives of the *cestuis que vie* in the then existing lease, subject to the life estate of *Thomas Trumper*, the grandfather, and, subject to the trust for renewing the lease and to the raising the £1500, upon trust for the testator for his life, and, subject also to the raising £2000 for younger children, in trust for the Defendant *Thomas Trumper;* and the trustees of this deed were directed, upon the death of the testator, to raise £2000 in trust for the testator's children by his then wife (except such child as should become entitled to the premises) as the testator and his then wife, or the survivor of them, should appoint. There were five children of this marriage, of whom the Defendant *Thomas Trumper* was the eldest. The grandfather, *Thomas Trumper*, died in 1814.

In 1815 a conveyance was executed by *Theophilus Beavan* and the several persons entitled to the £1500, whereby, after reciting that the testator had paid or otherwise satisfied to those persons the sums payable to them respectively, they joined with *T. Beavan* in conveying the premises comprised in the deed of 1805 to the testator, freed and discharged from the trusts of that deed.

In the month of May, 1818, all the *cestuis que vie* named in the original lease having died, the testator, under the circumstances and in the manner I shall hereafter state, procured a lease to be granted to him by the then Duke of *Beaufort* for three lives, which lease is still subsisting. In 1819 the testator purchased from the Duke the reversion in fee of the premises comprised in the last-mentioned lease, subject to that lease, and procured a conveyance to be made to a trustee for himself, his heirs and assigns.

The Plaintiffs contend that by this mode of dealing with the estate the charges of £1500 and £2000 were kept alive, and became and are chargeable as well upon the renewed lease as upon the reversion in fee.

Upon the marriage of the testator's daughter, now Mrs. *Mills*, a settlement, dated in 1838, was executed by the testator whereby, after reciting the payment by the testator of £1200, part of the £1500, to the persons entitled to receive it, and that £300 thereof only remained unpaid, and that the testator, "at the times when he so paid the said several sums amounting to £1200, did not intend that the same should sink into or be extinguished in the heredita-

ments on which the same were charged, but intended that the same should be a charge on the same hereditaments, and be kept alive for the benefit of his personal estate," the testator and his wife exercised their joint power of appointment by directing that £500, part of the £2000, should vest in Mrs. *Mills*, and that sum was assigned to the trustees named in the now stating settlement; and the testator assigned £600, part of the £1500, to the same trustees upon the trusts thereby declared.

The £300 which then remained unpaid of the £1500 was payable to *Winifred Hooper*, who died before May, 1845, and was satisfied, the testator having appropriated it towards satisfaction of his share as one of her next of kin.

In November, 1845, the testator, being then tenant for life of the leasehold and owner of the reversion in fee, and being (as he alleged and as the Plaintiffs contend) entitled to the £1500, *minus* the £600 assigned to the trustees of Mrs. *Mills'* settlement, his son, the Defendant *Thomas Trumper*, being entitled to the leasehold, subject to the testator's life interest therein, and the other children of the testator, except Mrs. *Mills*, being entitled to so much of the £2000 under the settlement as had not been appointed in favour of Mrs. *Mills*, joined in releasing and conveying the entirety of the same hereditaments and premises (except the £600 and £500 to mortgagees who are represented in this suit) for securing £4500, which mortgage is still subsisting.

In this state of the title the testator made his will.

On the part of the Defendant *Thomas Trumper* it was suggested as being open to doubt whether the renewal of the original lease enured to the benefit of the persons entitled to the charge; but this objection was not strongly insisted on, and if it had been, it could not, in my opinion, have been sustained. It was, however, argued that the testator, by the purchase made by him from the Duke of the reversion in fee, had prevented the charges from attaching on that interest; and it was this that raised the more serious difficulty. For it was said—and, as I believe, correctly—that no case is to be found in which the point has been distinctly determined. I think, however, that upon the general principles applicable in a Court of Equity to such circumstances there ought to be no doubt, and that there could be no danger in holding that

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a trustee, or a person in any degree in a fiduciary position, who had acquired the legal possession of and dominion over an estate, subject to a covenant for perpetual renewal, and who should so deal with the property as to make the renewal impossible, by his own act and for his own benefit, would be bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate, so far as might be necessary; and the cases which have been referred to, although they do not decide, go far to confirm this impression. For it was decided in *Evans* v. *Walshe* (1) that one who had covenanted with his lessee to renew upon certain terms could not refuse specifically to perform his covenant (although he had been since obliged to accept from his superior lessors a renewed lease upon terms much more onerous than those by which he was bound at the time when he entered into the contract with his lessee), unless he was content to give up the benefit of the more recent contract which he had made with his lessors, and to allow his lessee to stand in his place—a decision which could not have been arrived at unless Lord *Redesdale* had been satisfied that an equitable principle extended itself to the new interest which had been acquired; and so in *Randall* v. *Russell* (2), which was cited in the argument, where a testator, who held lands under a college as tenant from year to year, gave them to his widow during her widowhood, and she obtained a lease from the college, and afterwards purchased the reversion in fee from a person to whom the college had sold, it was held that the lease so obtained by her was subject to the trusts of the will, but that the reversion was not so subject, because it had been obtained from a person who was under no obligation to renew, and between whom and the testator's estate there was no privity or connection. Sir *W. Grant* there said: "If she had purchased from the college it might be said that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her, and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although," he adds, "I am not aware of any decision to that effect." *Hardman* v. *Johnson* (3) is somewhat similar in its circumstances, and the

(1) 2 Sch. & Lef. 519. (2) 3 Mer. 190. (3) 3 Mer. 347.

decision is to the like effect. The renewed lease obtained by a lessee who had a limited interest in the original lease, was held to be subject to the trusts of the original lease; but the purchase of the reversion by a devisee of the lessee was not held to subject it to the trusts of the original lease; this decision, however, was not made without the expression of a strong inclination on the part of the Judge to bring the case within the principle applicable to renewable leases, and with a clear sense of the danger of allowing "the trustee of a term to resort to the owner of a reversion to become a purchaser for his own benefit, for by that means he would debar his *cestui que trust* of the fair chance of renewal, getting into his own hands the power to grant a renewal or not, at his option." Having, however, further considered the case, and on a subsequent day, the Master of the Rolls decided that he could not apply the doctrine to the purchase by the devisee. In the more recent case of *Postlethwaite* v. *Lewthwaite* (1) the principle of *Evans* v. *Walshe* (2) is adopted, the Lord Chancellor, after quoting Lord *Redesdale's* words, saying: "This is tantamount to considering a purchasing lessee very much in the position of a partner or fiduciary with respect to his sub-lessee."

With these guides I think there can be no doubt of the existence of the equitable principle I have referred to. The dangers which would attend the exclusion of such a principle are so numerous and so serious that they would go near to destroy the fixed rules by which the dealings of persons in a fiduciary position with respect to trust estates and interests are governed. It is therefore to be considered whether the principle is applicable to the present case.

The circumstances attending the renewal of the 11th of May, 1818, are not in evidence, except so far as they may be properly gathered from the instrument itself. In June, 1815, *W. W. Trumper* had obtained from *Beavan*, the original trustee, a conveyance of the then existing lease. The three lives named in that lease had dropped, *Thomas Trumper's* in August, 1814, *C. W. Trumper's* in February, 1815, and *Mary Hooper's* in January, 1818. The covenant for perpetual renewal was, in terms, to be within twelve months from the death of the first of the *cestuis que vie*, and on the payment of a fine of £205 for the new life to be inserted.

(1) 2 J. & H. 237. (2) 2 Sch. & Lef. 519

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There must have been some dispute between the Duke, the lessor, and *W. W. Trumper*, as to the obligation of the former to grant, and the right of the latter to require, a renewed lease. It is impossible now to ascertain the particulars relating to this dispute. The lease, however, recites that *W. W. Trumper* had become entitled to the premises demised for the residue of the term therein then to come, and that he had, "upon the dropping of the said several lives respectively," requested the Duke to grant him a renewal of the lease according to the covenant, which the Duke (being unwilling to admit his liability upon the covenant) declined to do as a performance of the covenant; but at the same time agreed to grant to *W. W. Trumper* a lease for the three lives thereinafter named, in consideration of £615 as a fine or consideration for such grant, and *W. W. Trumper* agreed to accept such lease, "it being understood that the granting and acceptance thereof should not prejudice or conclude the rights of the parties with respect to the said covenant, and that such proviso to that effect should be inserted as thereinafter expressed;" and accordingly it was thereby provided and expressly agreed and declared by and between the Duke and *W. W. Trumper* "that the rights and liabilities of the said parties respectively in regard to the said recited covenant for renewal shall not be affected by the granting or acceptance of the present lease."

I take it therefore to be clear, that whatever the rights of *W. W. Trumper* to compel the perpetual renewal may have been, they remained wholly unprejudiced by the acceptance of this lease. Whether it was for the purpose of concluding all questions that might arise, or for whatsoever other reason, it seems that *W. W. Trumper*, the trustee as he was of this renewed lease, whose duty it had been to have procured the renewal of the lease within twelve months from August, 1814, who within that period had taken the conveyance from *Beavan*, who, as is recited, had, "upon the dropping of the several lives respectively," applied for the renewal, and who had accepted the renewed lease with the proviso mentioned, thought it expedient to buy up the reversion in fee, which was conveyed to him in January, 1819.

It seems to me impossible to refer what was done by *W. W. Trumper* to any intention on his part so to acquire the fee as

that he might defeat the charges upon the leasehold which had been perpetually renewable, and which, as he insisted, was still subject to such right of renewal. On the contrary, the only intention that can be properly imputed to him seems to be, that knowing if he failed in his controversy with the Duke, and if the renewal was not compellable as of right, that a question would remain which could only be determined at some remote period, and that as that question if it should be decided against him might expose him to personal liability, he pursued the prudent course of at once extinguishing all doubt upon the subject. But as he was able to do this only by means of the interest which he had under the original settlement of 1805 and the subsequent deeds, and by his connection with and knowledge of all the interests in the property, and in that fiduciary position which he had assumed, he could not and did not, in my opinion, by that purchase, affect or prejudice in any manner the charges in existence; but, on the contrary, having made the renewal of the lease impossible, he must be taken to have meant to substitute, and did effectually substitute, the fee so acquired to the extent of the charges for that right of renewal which he had rendered impracticable; and, therefore, that the sum of £1500 and the £2000 became as well charged upon the reversion in fee of which he disposed by his will, as they were originally charged upon the then existing lease by the deed of 1805 and by the settlement of 1811.

It is also contended by the Defendant, that having regard to the deed of 1815, the charges amounting to £1500 must be held to have been paid at that time, and therefore that no part of it is now raiseable. Under what circumstances and for what purpose that deed was executed is nowhere explained; but it is clear that it does not appear to have been acted upon. There is no reference to it in any of the instruments subsequently executed, and it was found in the repositories of *W. W. Trumper* after his death. Then when the deed of 1805 is produced there are found indorsed upon it receipts for several sums making up the amount of £1100 paid by *W. W. Trumper* at dates subsequent to the release of 1815, and a memorandum is indorsed on it, dated in 1830, to the effect that, as to the sum of £300 there mentioned, he intended it should be kept alive for the benefit of his personal

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estate. I have before noticed the recitals on the same subject in the settlement made upon the marriage of one of the daughters of *W. W. Trumper* in 1838, and the assignment thereby made of £600, part of the £1500, to the trustees of that settlement, of which trustees the present Defendant, *T. Trumper*, was one, and by whom the settlement containing these recitals was executed. If the fact had been simply that *W. W. Trumper*, the tenant for life under the deed of 1805, had paid off the charges, the legal presumption would have been that he intended to keep them alive for his own benefit. When to this presumption it is added that no fact or circumstance is stated on the part of the Defendant tending to rebut that presumption, and that on the other hand there is clear evidence that it was the intention of *W. W. Trumper* at all times, and that at no time was that intention more distinctly or emphatically stated than by the provisions of his will, I think there is no ground whatever for the contention which the Defendant *T. Trumper* has raised, that it must be assumed to have been the testator's intention in paying off the charges to benefit the Defendant, or whoever else might become entitled to the estate originally charged.

It remains then only to consider the effect of the will which was dated in 1856.

[His Honour stated the provisions of the will, and continued:—]

The testator died in 1859. Soon after his death disputes arose between the Defendant *T. Trumper* and the persons claiming the benefit of the charges. The Defendant disputed, as he still disputes, the liability of the estate which he takes under the settlement and under the will to any of those charges. To the correspondence which took place between his solicitor and the solicitor of the Plaintiffs on this subject I do not refer particularly, because such mention as is therein made of the charges is expressed to have been made without prejudice; but it is a circumstance not to be overlooked, that notwithstanding the Defendant did dispute the Plaintiffs' claim, he did continue to pay the interest on the charges for more than ten years.

Some points were discussed in the course of the argument on which, in the view I take of the case, it is unnecessary to rest my decision, but which, since they were raised, I will not pass without

notice. It was said for the Plaintiffs that, even if they were unable to sustain their primary contention, a case of election arose against the Defendant, for that the testator, considering that he had power to dispose of the sums charged, had so disposed of them, and that, if the Defendant was right in saying that they were extinguished, he could not avail himself of the devises made by the testator in his favour without giving effect to the testator's intention; and I think this is clearly so.

It was further contended that, if the claim of the Plaintiffs should be held only to extend to the existing lease, the mortgagees, whose security comprehended the reversion, ought to resort to that estate in the first instance, so as to leave as much as possible of the value of the leasehold for the purpose of satisfying such claim; and this would, I think, be consistent with the well-established principles upon which this Court directs the marshalling of securities so as to preserve the rights of, and do full justice between, the parties interested.

However, for the reasons I have stated, I am of opinion that, without further regard to the points lastly mentioned, the Plaintiffs are entitled, as regards the Defendant *Thomas Trumper*, to the relief they have prayed. It must be declared that the three sums of £1500, £2000, and £500 are charged upon the *Grosmont* estate, of which the Defendant *Thomas Trumper* is the owner; and that £600 and £500, part of the two first-mentioned sums, are so charged in priority to the mortgage debt of £4500. Such accounts must be taken as may be requisite for ascertaining the amount due in respect of these charges for principal and interest from the 23rd of June, 1869; and that amount must be paid by the Defendant *Thomas Trumper*, or must be raised out of the estate.

Solicitor for the Plaintiffs: Mr. *Fortune*, agent for Mr. *Humfrys, Hereford.*

Solicitors for the Defendant *Thomas Trumper*: Messrs. *Bridges, Sawtell, & Co.*, agents for Mr. *Price, Abergavenny.*

Solicitors for other Defendants: Messrs. *Bridges, Sawtell, & Co.*, agents for Messrs. *Collins, Ross, Hereford.*

Solicitor for the Mortgagees: Mr. *Joseph Raw*, agent for Mr. *Oakley, Monmouth.*

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1872
July 18, 19.

In re BRITISH AND AMERICAN TELEGRAPH COMPANY.

FOWLER'S CASE.

Winding-up—Contributory—Director's Qualification.

8 Ch 551 n, 18 Eq 481, 1 Ch D. 620, 2, 5 Ch D. 320 7 Ch D. 135. 8 Q B D 693 696

Articles of association provided that no person should be capable of serving as a director unless at the time of his appointment he should hold twenty-five shares. On the 14th of February, 1867, the directors of the company were appointed, and at the same time it was resolved to allot twenty-five shares to each of the persons named as directors. *A.*, one of these persons, had consented to act as director; but in ignorance, as he stated, that any shares had been allotted to him, and under the mistaken impression that the necessary qualification was twenty £25 shares, and not twenty-five £20 shares, applied on the 1st of March, 1867, for twenty shares, which were allotted to him. He attended meetings and continued to act as director until October, 1867, shortly after which the company was ordered to be wound up:—

Held, that he was liable, not only for the twenty shares for which he had applied on the 1st of March, but also for the twenty-five which were allotted to him as his director's qualification, pursuant to the articles of association, on the 14th of February, 1867.

ADJOURNED SUMMONS upon an application, on the part of *R. N. Fowler*, that his name might be removed from the list of contributories of the *British and American Telegraph Company, Limited*, in respect of twenty-five of the shares for which he had been settled.

The company was formed early in 1867 under a memorandum and articles of association, by which it was provided (Art. 63):—

"No person shall be hereafter capable of serving as a director of the company unless at the time of his appointment or election he shall hold and be entitled to vote in respect of at least twenty-five shares."

On the 14th of February, 1867, at a meeting of the subscribers to the memorandum of association, resolutions were passed allotting twenty-five shares to each of certain persons, of whom Mr. *Fowler* was one, and appointing those persons directors. On the 1st of March, 1867, Mr. *Fowler*, for the purpose, as he stated, of qualifying himself as a director, and without being aware that twenty-

Ref to Hens Brighton Line Co. Parkers Case 1 Ch D 620, 622.

five shares had already been allotted to him at the meeting of the 14th of February, applied in writing for twenty shares, and paid a deposit of £2 per share. The application was acceded to, and the twenty shares were allotted to him.

Mr. *Fowler* attended meetings and acted as a director until October, 1867, when he resigned his seat at the board. In November, 1867, an order was made for a compulsory winding-up of the company.

Mr. *Fowler*, having been settled on the list of contributories for forty-five shares, had taken out a summons that his name might be removed from the list in respect of twenty-five shares.

The Chief Clerk having decided substantially in favour of Mr. *Fowler's* application, the summons was adjourned into Court on the application of the official liquidator. In the course of the proceedings *Fowler*, by his solicitor, wrote admitting his liability for twenty-five shares, the number necessary to qualify him as a director, but objected to being placed on the list for more.

In his affidavit and cross-examination Mr. *Fowler* stated that he never intended to hold a greater number of shares in the company than was necessary for his qualification as a director. Having been told that the qualification was £500 worth in shares, he thought this amount was made up of twenty £25 shares, and not twenty-five £20 shares. Under this impression he had applied for twenty shares on the 1st of March, and paid a deposit of £40. He was not present at the meeting of the 14th of February, 1867, and did not recollect whether he had any notice that the twenty-five shares forming his qualification had been allotted to him. If he did receive such a notice he took it as referring to the twenty shares on which he had paid the deposit. Mr. *Fowler* also stated that in June, 1867, he became aware for the first time that the twenty-five shares referred to had been allotted to him. Though his name appeared in the minutes of the 27th of February, 1867, as being present, he was not, he believed, present when the minutes of the previous meeting (by which his attention would have been called to the allotment to him of the twenty-five shares) were read.

Mr. *Kay*, Q.C., and Mr. *Macnaghten*, for the official liquidator:—

By accepting the office and acting as director, Mr. *Fowler* must

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be taken to have knowingly incurred the obligation of taking the number of shares necessary for his qualification, and he is therefore as much liable for the twenty-five shares allotted to him on his appointment as director on the 14th of February (pursuant to the articles of association) as for the twenty for which he made a direct application, and paid the deposit on the 1st of March, 1867: *Leeke's Case* (1); *Harward's Case* (2); *In re Disderi & Co.* (3); *Kincaid's Case* (4). Even assuming that the fact of the allotment of the twenty-five shares was not communicated to him, the case is one in which, from his having accepted the position of director, he must be taken to have been aware that the shares had been allotted to him without formal notice of the fact: *Levita's Case* (5); *Gunn's Case* (6).

Mr. *Eddis*, Q.C., and Mr. *Waller*, for Mr. *Fowler*:—

Mr. *Fowler* has never denied his liability for twenty-five shares, the number necessary to his qualification as director, but there is his express statement that he never intended to become liable for more than the necessary qualification; that he did not know that the twenty-five shares had been allotted to him on the 14th of February; and that when he made his application on the 1st of March it was for the mere purpose of qualifying himself, in ignorance of any previous allotment, and under the impression that the holding of twenty £25 shares, and not twenty-five £20 shares, was requisite. His only contract with the company in respect of shares is that which is contained in his application of the 1st of March. No notice of any previous allotment was sent to him, and the mere fact of his attendance for a short time at the meeting of the 27th of February will not fix him with constructive notice of such allotment. Under these circumstances he is only liable for the shares for which he applied on the 1st of March, and which were accordingly allotted to him: *In re Llanharry Hematite Iron Company, Ex parte Stock* (7); *Tothill's Case* (8); but as his application was for the purpose of qualifying himself as director, and was

(1) Law Rep. 6 Ch. 469.
(2) Ibid. 13 Eq. 30.
(3) Ibid. 11 Eq. 242.
(4) Ibid. 192.
(5) Law Rep. 3 Ch. 36.
(6) Ibid. 40.
(7) 12 W. R. 814, 994; 33 L. J. (Ch.) 731. 10 Jur NS 790, 842
(8) Law Rep. 1 Ch. 85.

(7) 1 C 4 De G J & S. 426

made under a mistake as to the number necessary, he submits to be liable for five more so as to complete his qualification.

SIR JAMES BACON, V.C.:—

Without looking at the form of the summons technically or strictly, the question is simply whether Mr. *Fowler* ought to remain upon the share list for twenty shares allotted to him upon his application, and twenty-five shares which were allotted to him in his character of director. Mr. *Eddis* has admitted, as indeed it could not be disputed in the face of the repeated authorities upon the subject, that having been named as a director, having attended and acted as a director, and the constitution of the company requiring that the man who becomes a director should be the holder of twenty-five shares, he is rightly upon the register for twenty-five shares. Upon that, therefore, no question has been, and none can be, raised. Then is he also liable to be upon the register for twenty shares? That seems to me to be clearly and plainly supported by the contract; and I entirely concur in the statement that the contract must be the basis of any liability which the shareholders are under. He writes a letter, after he was the holder of twenty-five shares, applying for twenty shares. His application is received in due course. He pays the deposit upon twenty shares, and twenty shares are allotted to him, and now it is said that, because he was under some mistake in that respect, he is not to be upon the share register. There is not the slightest ground for entertaining any such proposition. Mistake no doubt may often set aside a contract. But the creditors in this case, who have a right to look for payment to the persons upon the share list, are bound only to shew that by a plain contract in writing the shareholder in question is a holder of twenty shares. In my opinion the case is as clear as anything can be. By being named as a director he became liable to take twenty-five shares. By acting as a director he recognised his liability in that respect. That is indelible; and then at another time, under other circumstances, he desires to have twenty shares, and he has them, they are his. How can I, this being in the interest of creditors who are to be regarded under the winding-up, say it is proved to my satisfaction that there was such

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a mistake as to avoid the contract, that *Fowler* made a mistake in writing for twenty, and that he meant to write for twenty-five shares. Every case that has been or could be referred to shews most distinctly, if authority were required, that for the twenty-five shares, the subject of his original contract, confirmed by his attendance as a director, his name appearing in the attendance book, he is fixed, and nothing can disturb him. Then with respect to the twenty shares, it being admitted that he must be a shareholder for twenty-five shares, it is proposed that five shares, taken I know not whence, should be added to the twenty shares upon which he has paid the deposit, and that that should satisfy his qualification of director and acquit his liability to the company. To entertain for a moment such a proposition would be monstrous, and to adopt, if I may say so without offence to anybody, a transparent fallacy. *Tothill's Case* (1) has been referred to as an authority in favour of Mr. *Fowler's* contention. But there is not the most remote resemblance that I am able to trace between that and the present case. *Tothill* consented to join the board of directors, and signed the memorandum of association for twenty-five shares, and for those twenty-five shares he was unquestionably liable. But he afterwards applied for fifty shares, and his application was not accepted. No answer was given, and no allotment was made to him in consequence of his application, but the allotment which was subsequently made was made without his knowledge and in pursuance of certain resolutions come to by the directors at times when he was not present. Therefore it is that Lord Justice *Turner* says, that a man cannot be fixed with acquiesence unless it is shewn that he knew what the thing was which he is said to have acquiesced in. He agreed to take twenty-five shares, and for those twenty-five shares he was liable. Fifty more he asked to have, but his application was not acceded to, and therefore he was not liable in respect of any of those fifty shares or any more than the twenty-five for which as director he was fixed. *Tothill's Case*, therefore, has not the most remote application to the present. At one of the meetings he was no doubt present, and the liquidator founds his claim to have him put upon the list for twenty-five shares upon the articles of association, the resolution

(1) Law Rep. 1 Ch. 85.

by which he was appointed director, the fact that he knew that that resolution had been passed, and the consequent legal liability to take twenty-five shares, which liability is established by repeated decisions. The twenty shares, as I have said, stand upon a totally different footing. With no reference in his letter, no statement made by him verbally or otherwise, that in applying for twenty shares he meant to apply for twenty-five, I am asked to say that there was a mistake. I am not satisfied that there was any mistake; but whether there was so or not, it was a contract entered into in writing, deposit paid, allotment made and a liability created to the creditors of the company—if there were, as I do not think there is, any question between the directors and the shareholders—it is, in my opinion, beyond doubt or question that he is properly placed upon the list of contributories for the twenty and also for the twenty-five shares.

Summons refused with costs of the adjournment into Court.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *R. & W. B. Smith.*

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April 22, 23; *May* 7.

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[1871 P. 163.]

Turkish Trading Company—English Directors—Libel—Costs—Payments Ultrà Vires—Injunction.

It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority—whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association.

English directors of a foreign railway company, which was subject to Turkish law (as to which there was no evidence before the Court), were restrained from applying the funds of the company in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company; but were not, under the circumstances of the case, ordered to repay the amount of certain of the costs already so satisfied by them.

Motion for decree.

The Plaintiff in this suit was a holder of 500 shares in the *Ottoman Railway* from *Smyrna* to *Aidin*, of his Imperial Majesty the Sultan; and he filed the bill in the suit on behalf of himself and all others the shareholders of the company, except such as were Defendants thereto, against both the council of administration (or directors) of the company, and the company.

The company was created by a concession and firman of the Sultan. The instruments were written in the Turkish language. The concession was in form an agreement relative to the railway from *Smyrna* to *Guzel Hesar*, *Aidin*, and dated in the year of the Hegira, 1273, the 23rd Mouharrem, which corresponded with the year 1856, the 23rd of September. It was made between the Turkish Ministers of Foreign Affairs, of Finance, and of Commerce and Public Works, of the one part, and Mr. *Robert Wilkin*, as the

duly authorized attorney for Sir *Joseph Paxton, George Wythes, William Jackson,* and *Augustus William Rixon,* founders of the company, of the other part. The concession contained thirty articles. It provided (*inter alia*) that the company should complete their main line of railway, and the electric telegraphs by the side of it, within four years from the date of the firman; that Government land should be given to the company on the title of a gratuitous lease; that private land might be expropriated; for royalties on coal mines; the due supply of materials; and the verification of expenditure. Further, it provided that (Art. 16) the sum of £24,000, which represented £2 per cent. on the capital of £1,200,000, should be deposited as security for all the clauses of the agreement: that (Art. 17) the railway should be named as above, and be placed under the high supervision of the Sublime Porte, in order that the principles of the concession, and the general laws of the empire, might be maintained and respected: that (Art. 18) the concession should enure for fifty years, with certain powers of renewal; and (Art. 19) of re-purchase by the Turkish Government: that (Art. 20) the state should guarantee to the company during the fifty years of the concession interest at 6 per cent. per annum, upon the capital employed by it, until it reached at the highest a sum of £1,200,000 on the execution of its works; that if the capital employed was less than that amount, the state should pay the interest in proportion, but not beyond that amount; so that the interest annually guaranteed by the state could not exceed £72,000; that whenever the net profits of the line should exceed £7 per cent. on the guaranteed capital, the excess should be divided equally between the company and the Government: that (Art. 22) no concession should be granted for a competing line without the consent of the company: that (Art. 24) the company should obtain, by the issue of shares, the necessary capital for the construction of the line, reserving a quarter of the shares for the subjects of the Sublime Porte, at the same price and on the same conditions as to the other subscribers; and that such of the shares as should not be subscribed for within the term fixed by the company, should return to the disposition of the same: that (Art. 25) the company should draw up its statutes, fix general tariff, and make special regulations in the usual manner,

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submit them to the Imperial Government for its approval, and put them in operation after having obtained the sanction of the Sultan; that the company, as a body, should always be subject to the existing and future laws and general regulations of the empire, and that persons likewise in the company's service should be individually under the protection of the nations to which they belonged; but all civil and criminal actions brought against them should be conformable to precedents established in similar cases. The firman was dated the 15th day of the month Sefer-Ul-Khair, of the same year 1273, which corresponded with October, 1856. It referred to the parties represented by Mr. *Wilkin*, as persons well known in *England*, and described them as "founders of the company formed in *London*" for the construction of the railway; and it ordained that the company should form itself under the name of the *Ottoman Company* for the fifty years; and should always be under submission to the laws of the Sublime Porte, and placed under its supervision.

The statutes of the company, which were also in the Turkish language, provided (*inter alia*) that (Art. 1) the signitaries thereto should form, under the authority of the Sultan, an anonymous partnership, which should exist between all the proprietors of the shares issued in pursuance of those presents: that (Art. 2) the objects of the company should be (1) the construction and working of the railway, wharves, piers, warehouses, custom-house, and any other buildings authorized by the Imperial concession of the 23rd of September, 1856; (2) the construction and working of all or any other railways in the Turkish empire, which might be thereafter conceded to the company, or leased or bought by it; (3) the organization and working of every description of communication, either by land or water, in connection with the railway; (4) the enjoyment and working of all lands, mines, forests, machinery, and other things then or thereafter to be conceded to a purchaser, or leased by the company: that (Art. 3) the seat of the society should be at *Smyrna;* that the capital of the company (which by Art. 7 was originally fixed at £1,200,000, represented by 60,000 shares of £20 each) should (by an additional article of March, 1864, Art. 1) be raised to £1,784,000; and (by Art. 2) be divided into shares and debentures as follows, viz.:—

44,600 shares of £20, representing . . £892,000
Debentures bearing £6 per cent. interest £892,000 } £1,784,000;

and that of the £892,000 debentures, £304,000 should be held as a first application for the redemption of £250,000 of debentures, issued by order of a previous convention, and repayable on the 1st of May, 1866: that (Art. 8) each share should give a right to a proportionate part of the property and profits of the company: that (Art. 9) provisional or scrip certificates of shares should be issued in the first instance, in exchange for the receipt of the deposit of £1 per share; and should be "to bearer," and transmissible by simple delivery, without any written or formal transfer: that (Art. 11) the shares should be indivisible, and the company would only recognise a single proprietor for each share: that (Art. 12) the holding of a share implied and necessitated adhesion to the statutes of the company: that (Art. 20) the liability of the shareholders would be limited to the payment of £20 per share: that (Art. 21) the affairs of the company should be managed by a council of administration in *London*, composed of (additional article, 30th May, 1862, Art. 1) nine members: that (Art. 30) the place of meeting of the board might be either in the Ottoman Empire, *France*, or *England*, as might from time to time be determined on by the council itself: that (Art. 40) the council of administration should be invested with the fullest powers for the administration of the affairs of the company, and that (*inter alia*) it should (clause *n. ad finem*) authorize all legal proceedings, precautionary measures, and agreements for compromise; (clause *o*) nominate and recall all agents and employés, fix their salaries and gratuities, and generally decide on all matters which affected the management of the company; (clause *p*) cause true accounts to be kept of the property of the company, of the sums of money received and expended by the company, and the matters in respect of which such receipt and expenditure took place, and of the credits and liabilities of the company; and (clause *s*) should fix the place of the general meetings: that (Art. 42) the members of the council of administration should not be collectively or individually responsible for or in respect of any contracts or engagements made by the council on behalf of the company, or for any wrongful acts or defaults of the company: that (Art. 43)

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the general meeting regularly constituted represented the entire body of shareholders: that (Art. 44) the general meeting should be composed of not less than ten shareholders, holding in the aggregate, either personally or by proxy, 500 shares at least; and should be held in *London,* or such other place as might be appointed by the council of administration during the month of March, and in the month of September during every year: that (Art. 48) a meeting should be regularly constituted when ten shareholders, holding, either personally or by proxy, 500 shares, were present: that (Art. 49) the decisions of general meetings should be taken by a majority of votes: that (Art. 55) a special meeting might be convened either by the directors themselves, or by the written demand of fifteen shareholders, holding in all 5,000 shares: that (Art. 56) all general meetings, whether ordinary or special, might decide upon any and every proposal made by shareholders, provided that such proposal had been communicated in writing to the secretary of the company at least twenty-eight days before notice of such general meeting: that (Art. 57) the chairman or deputy-chairman of the council of administration, or, them failing, any member of the same, should preside at all general meetings, whether special or ordinary: that (Art. 58) the decision of general meetings should be taken, in the first instance, by a majority of voices; and, in case of equality, the chairman should have the casting vote: that (Art. 60) the general assembly should receive the report of the council of administration on the state of affairs of the company; discuss, approve, or reject the accounts; fix the dividend on the report or recommendation of the council; elect the directors to supply vacancies, in accordance with the preceding clauses; deliberate on any propositions which might be submitted to it by the council of administration, relative to the increase of capital of the undertaking, the prolonging the term, and duration of the company, any modifications requisite to be made in the statutes and winding-up of the concern; and that it should have the supreme control over all the interests of the company, and invest the council of administration with the powers necessary to meet any extraordinary cases not thereinbefore provided for: that (Art. 61) the deliberations of the assembly, held conformably to the statutes, should bind all the shareholders, as well

absent as dissentient: that (Art. 69) a printed copy of the balance sheet and report should, seven days previously to the general meeting, be obtainable at the company's offices by any shareholder who might demand same: that (Art. 70) the profits of the company, after deducting the ordinary costs, charges, and expenses, should be applied in the following manner, viz.:—

First: "As a reserve fund if thought expedient, and so resolved by the council of administration, to meet any losses occasioned by unforeseen circumstances, or to equalize the dividend, or for relaying the permanent way, or for other similar purposes in connection with the works."

Secondly: "In the payment of a dividend amongst the shareholders, subject to the right of the Government to participate in the event of the divisible profits exceeding 7 per cent."

That (Art. 73) the accounts should be submitted to the general meeting, which had power to approve or reject them, and fix the dividend upon the report and recommendation of the council of administration: that (Art. 74) if the accounts were not approved of at the general meeting, it should have power to nominate a committee for the purpose of examining into and making a report on same; that such committee should lay their report before a meeting, which it should have power to convene for the purpose: that (Art. 75) the accounts of the company should be examined, and the correctness of the balance sheet ascertained by one or more auditor or auditors; and that (Art. 89) no shareholder of the company should be personally or individually liable for any debts or engagements of the company: but the funds of the company, including therein all unpaid calls upon shares, should alone be answerable for such debts and engagements.

The company duly proceeded with its undertaking, in reliance upon the guarantee of the Turkish Government. Memorials with reference to the guarantee were from time to time presented by the directors of the company to the officials of the Sublime Porte. In and for some time prior to 1868, Lord *Stanley*, who was then Her Majesty's principal Secretary of State for Foreign Affairs, had supported the representations of the company made to him through the council, by authorizing Her Majesty's ambassador at *Constantinople* to present the company's memorials to the Grand

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Vizier, and to render them such unofficial assistance as the facts of their claims might warrant.

On the 31st of December, 1867, the claims of the company upon the Turkish Government in respect of the unpaid arrears of the guarantee amounted to a sum of £184,752 14*s.* 7*d.*; and early in the month of September, 1868, the council instructed their secretary, Mr. *Cook*, to proceed to *Constantinople* with a view of urging the Turkish Government to come to a definite settlement of the company's claim. Mr. *Cook* accordingly went to *Constantinople*, and on the 26th of September, 1868, saw Mr. *Ritter*, the secretary of the Public Works Department, acting on behalf of the Turkish Government. Mr. *Ritter* informed Mr. *Cook* that he had received a communication from *Daoud Pacha*, with a letter from Mr. *Ellissen*, and handed the letter to Mr. *Cook*. He read it, and immediately telegraphed the effect of it to the council of administration in *London*. The telegram was as follows:—

"*Constantinople.*

"*Ellissen* writes Government not to pay guarantee to directors, who had misapplied the same, and may do so again. We have seen letter."

Shortly before this time some of the shareholders of the company had appointed a committee of investigation into the conduct of the directors. To that committee, however, it is not material more particularly to refer. But on the 2nd of June, 1868, others of the shareholders, being also dissatisfied with the conduct of the council of administration, held a meeting, at which the following resolutions were adopted:—

"That, in the present position of the company, it is desirable, for the protection of the interests of the shareholders, that a committee of consultation be formed to watch the proceedings of the directors:

"That Mr. *Ellissen* be requested to act as the honorary secretary of the committee of consultation."

Mr. *Ellissen* accordingly acted as the secretary of that committee. In the course of his employment as secretary, and in pursuance of a resolution of the committee, he on the 19th of August, 1868, the 1st of September, 1868, the 5th of September, 1868, and the 30th of September, 1868, wrote certain letters to Lord *Stanley*. The letters

were strongly condemnatory of the council of administration, or board of directors (as such), for their management of the affairs of the company. They also contained statements alleged to be libellous upon them; and, on the assumption that, if the Turkish Government resumed the payment of the guarantee, all the money so obtained would be misapplied by the directors for payment to the debenture holders of the company, prayed that Her Majesty's Government at home, and their representatives abroad, would refuse to support the board of directors. The result was, that Lord *Stanley* withdrew the limited assistance which he had till that time afforded to the company; and although Mr. *Ellissen* then stated that, acting as the organ of the committee of consultation, he had expressed their distrust of the official conduct only of the council, and had in no degree imputed doubts as to the personal integrity of the members of it, Lord *Stanley* continued the withdrawal of his assistance.

The Turkish Government did not at that time pay any further portions of the arrears of the guarantee; the company were prevented from fulfilling their engagements; their shares were consequently depreciated; and the rivalry of factions was added to the other difficulties with which they had to contend. In that state of things, a general meeting or assembly of the company was held on the 30th of September, 1868, at which the council of administration was present. The following resolution was then proposed:—

"That this meeting distinctly repudiates the unauthorized and unwarrantable proceedings of those who, calling themselves a committee of consultation of the shareholders, are acting in direct opposition to the wishes and interests of the shareholders, and requests the council of administration to adopt the strongest possible measures to put an end to such mischievous action."

No notice of that proposal had been given to the secretary of the company, as provided by art. 56 of the statutes, and a shareholder who was present pointed out that on that account the meeting was not competent to entertain it. During the discussion which then ensued the Plaintiff moved an amendment to the resolution, which was seconded by a M. *Mariano Vives*—"That the representations of the directors in the past and present capital and revenue accounts, and also the negotiations with the Ottoman

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Government, be referred to a committee to investigate and report to a special meeting." That amendment was lost, and the original resolution was carried by a large majority. A poll was then demanded and granted, and on a scrutiny the result was as follows: —For the resolution, 9240 shares, representing 771 votes; against it, none.

The council of administration thereupon instituted criminal proceedings for libel against Mr. *Ellissen* on the ground of his letters to Lord *Stanley*. Mr. *Ellissen* pleaded not guilty, and a justification. The case was tried at the Central Criminal Court before a jury, which, not being able to agree, was discharged. The proceedings were afterwards removed by *certiorari* to the Court of Queen's Bench, where the issue was tried before a special jury, but without a verdict being returned, on account of the jury not being unanimous. On two other occasions, also, the case was opened before a special jury, but not proceeded with; on the first occasion on account of the illness of one of the jurymen, and on the second for want of time at the disposal of the Court to finish the case. The proceedings had been since renewed, and were still pending.

The Turkish Government had in the meantime paid the following sums on account of the arrears of the guarantee, viz., on the 28th of August, 1869, £50,000 in mandats; on the 4th of November, 1869, £75,000 in mandats; and a few days after that the sum of £5050 14*s.* cash.

In 1869 an ordinary general meeting of the company was held, at which it was admitted by the council that of the law costs then charged by them against the company about £200 had been incurred as the costs of the proceedings in the libel.

On the 31st of March, 1871, another ordinary general meeting of the company was held, to which the statement of the revenue account for the half-year ending the 31st of December, 1870, was submitted by the council. In that account the law charges of the company were mixed up with other charges in an item amounting to £1796 18*s.* 7*d.*, and it was admitted that about £900 of that item had been also incurred as the costs of the proceedings for the libel.

Notwithstanding those admissions, however, the accounts containing those items were respectively approved by those general

meetings. The Plaintiff alleged that he never voted for or concurred in such approval, but protested against it at each of the meetings, and submitted that the costs of the criminal proceedings for the libel were not properly chargeable against the company; and that it was beyond the power of any general meeting or assembly of the company to order or adopt such proceedings or to burden the company with the costs thereof. The bill stated that those proceedings were taken and still persevered in by the council of administration, entirely for their own personal satisfaction and benefit, and for that of a party among the shareholders; that such proceedings did not fall within the objects of the company; and that the council ought to bear the costs thereof; but that they nevertheless had paid, or threatened or intended to pay, such costs out of the moneys of the company. It then prayed a declaration that the costs of the proceedings for the libel were not properly chargeable against, and ought not to be borne by, the company; and that the Defendants, other than the company, and all other the officers and servants of the company for the time being, might be restrained by the order and injunction of the Court from applying any moneys of the company in or towards payment of the said costs; that an account might be taken of all moneys of the company which had been applied by the Defendants, other than the company, or any of them, in or towards payment of the said costs; that the Defendants, other than the company, might be declared liable, and decreed jointly and severally to repay to the company, with interest, so much of the moneys of the company as should be found to have been so applied; and that the Defendants, other than the company, might pay the costs of the suit.

The Defendants, the council of administration, by their answer admitted (*inter alia*) that they were fully aware, on the 2nd of June, 1868, of the differences of opinion among the shareholders of the company. They believed, however, that the committee of consultation was not elected by any of the shareholders, and was a self-appointed committee. They said that, until they had received a letter upon the subject from Lord *Stanley's* secretary, they knew nothing of Mr. *Ellissen* or his committee; and that although directly after the resolution of the 30th of September, 1868, and

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on the authority of it alone, they had instituted the criminal proceedings for the libel, they had done so as council of administration, and with full power to do so independently of that authority. They insisted, however, that they had acted properly under the concession and statutes of the company, and solely in the interests of it; and denied all personal feeling in the matter. They said that all the costs incurred by the company in respect of the proceedings had been paid at the time the Plaintiff filed the bill in this suit, viz., the 6th of November, 1871; and that he could have known that such costs were paid by inquiry at the company's office. Therefore, and having regard to the peculiar constitution of this company, they contended that the Plaintiff was bound by what had been done.

Further, they submitted that a suit of *Vives* v. *Ottoman Railway Company* and two other suits had been instituted against this same company, in other branches of the Court, to settle the priorities of the debenture holders, with which suits (or some or one of them) this should have been consolidated. They also said that the libels were false, malicious, and injurious to the company—that the stopping of them was advantageous to it—and that they were advised they could not abandon the proceedings with respect to them without paying Mr. *Ellissen*'s costs.

Mr. *Lindley*, Q.C., and Mr. *Westlake*, for the Plaintiff:—

The Defendants contend that the expenditure in question is within the scope and objects of this company; that the silencing of Mr. *Ellissen* has been advantageous to the company; that the Plaintiff has acquiesced in what has been done; and that he has been guilty of laches. But, first, no proper notice of the resolution of the 30th of September, 1868, was given. The resolution, therefore, is of no force whatever as against the dissentient shareholders. Assuming that the majority were doing what the minority disapproved of, and that the majority did wish to put an end, as stated, to what was called "such mischievous action," still we contend that the payment of these costs is wholly *ultrà vires* the association. Therefore, even although the majority of shareholders at that meeting may have passed the resolution, the company cannot act on it, and the council, that is, the directors,

cannot carry it out or sanction it. Mr. *Ellissen* was indicted for a libel. He pleaded not guilty, a justification, that the publication of the alleged libel was in the interest and for the benefit of the public. But the important point for us is that the libel was essentially against "individuals," and one with which the company, *quâ* company, had not and has nothing whatever to do. It does not really touch the company in its corporate capacity. The council say they are bound to prosecute, and are still going on with fresh proceedings. But if we are right, and the principles on which we rely are old and well-established in this Court, they cannot do so; at least at the cost of the company. It is quite regular for a company to defend itself if it is attacked in its commercial character, or to spend its money in opposing a bill in Parliament which it may think will, if passed into an Act, be injurious to it. So also a company may sue or defend its own directors or agents in respect of acts done by them which relate to the express purposes of the company. In all such cases it may spend its own money in recovering its own property or in insisting on its own rights. But here nothing of the sort is being done. No company has a right to expend its funds in the prosecution of a suit not instituted by it: *Kernaghan* v. *Williams* (1); or to embark its money in any litigation or matters not strictly within the objects for which it was created. Then, again, if you can libel a body corporate, and do so, the remedy must be sought by the body itself, and not by the directors of it. *Reg.* v. *Mayor, &c., of Bridgewater* (2); *Attorney-General* v. *Mayor, &c., of Norwich* (3), are distinguishable from the present case.

Then, further, if this expenditure is, as we say it is, wholly *ultrà vires* the company, no majority can bind the minority to it, even when their votes are obtained at a regularly constituted meeting; and, *à fortiori*, the Plaintiff cannot have acquiesced in what may have in this instance been resolved upon.

Then there only remains this to be observed: The Defendants say that because the money actually paid for these costs by them was paid and approved of six months before the bill was filed, the Plaintiff, therefore, cannot object to the like payment of the

(1) Law Rep. 6 Eq. 228. (2) 10 A. & E. 281.
(3) 2 My. & Cr. 406, 420, 421.

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remainder; and coming as he does now, he has been guilty of delay. But such a delay as that cannot—the Defendants intending to go on with this prosecution—be the least bar to him. A minority of the shareholders could, in such a case as this, maintain their suit against the majority; and we say, if the Plaintiff had sued for himself alone, he could: *Metropolitan Saloon Omnibus Company* v. *Hawkins* (1); *King* v. *Knut* (2); *Starkie* on Libel (3); *Bill* v. *Sierra Nevada Lake Water and Mining Company* (4); *Whitfield* v. *South-Eastern Railway Company* (5).

Mr. *Bristowe*, Q.C., and Mr. *Loudon*, for the Defendants:—

The authorities cited by the Plaintiff are most of them cases relating merely to English municipal law, and have no application here. This case is one of a foreign company—a *société anonyme*—subject to Turkish law,—and the concession, firman, and statutes of which must be construed by that law. The Plaintiff has not proved what that law is, and if he asks this Court to prevent quasi trustees, which these Defendants are, from paying away moneys in their hands, and to compel them to repay money paid by them, on the ground of such payments having been or being *ultrà vires*, he is bound to place his case most strictly right before the Court. He has not so launched the case. We say, therefore, that this Court has no jurisdiction to determine the question now at issue; and that the Plaintiff has acquiesced in what has been done, and is precluded from going on with this suit. We say also that there has been a misjoinder of parties.

First, the Turkish Courts are the proper tribunals for this case, because this is a company the council of which is invested by its statutes with most extraordinary powers. If this company were a French one, no member could, in the absence of fraud, sue the directors in respect of money alleged to be improperly expended by them. These statutes provide that (Art. 42) the council is not to be responsible, and that (Art. 61) every absent or dissentient shareholder is to be expressly bound by the votes, in general assembly, of the majority of shareholders present. The rules or charters of this

(1) 4 H. & N. 87. 5 Jur. N.S. 226 (3) 3rd. Ed. 436.
(2) 2 Bar. 114. (4) 1 D. F. & J. 177. 6 Jur. N.S. 184
(5) E. B. & E. 115. 4 Jur. N.S. 888

company are wholly different from those of any English one, and this Court cannot properly construe them (the Concession, Art. 25). What these directors did they did in pursuance of the unanimously expressed wishes of the company, and it is quite impossible for this Court, in the absence of any evidence as to what is the Turkish law on the subject, to say that, according to it, these payments may not have been perfectly justifiable.

But we also insist that, even according to English law, on such statutes as these the payments are good. It is proved that the prospects of the company were materially affected by the publication of these libels, and that the prosecution of Mr. *Ellissen* stopped them, after which the Turkish Government paid up some of the arrears of the guarantee. How can the application of the money of the company to purposes ending in such an advantageous result be, under any circumstances, treated as either bad or *ultrà vires* the company?

Then as to the misjoinder: The Plaintiff says he is proceeding against the directors of the company; that the libel affects them only as individuals, and not the company, *quâ* company. Why, then, has he made the company, in their corporate capacity, co-Defendants? Then, again, he sues on behalf of himself and all other shareholders in the company, except such as are Defendants to the suit. But the company also represents all the shareholders, and all the shareholders, we say (other than the Plaintiff), approved of what has been done. Therefore, even assuming for a moment that he is right in saying that this expenditure is *ultrà vires*, he is wrong in so joining the parties to this suit as he has. We admit that if the expenditure is *ultrà vires*, no majority can force it on a minority of the shareholders. But we say that it is not *ultrà vires*. These proceedings for libel, and the costs of them, are matters relating to the internal management of the affairs of the company, with which it is quite competent to deal—with which it has dealt—and a subject of its discretion with which this Court will not interfere: *Bloxam* v. *Metropolitan Railway Company* (1).

Then, again, having regard to the statutes, the Plaintiff has, in fact, acquiesced in what has been done. He was present at the meeting of the 30th of September, 1868, and, notwithstanding

(1) Law Rep. 3 Ch. 337.

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his opposition, and the absence of the requisite notice, he is, by force of the statutes, expressly bound. Indeed, he would have been so even if absent.

[They also cited *Kent* v. *Jackson* (1); *Elborough* v. *Ayres* (2).]

Mr. *Lindley*, in reply:—

All the pleadings in this case are framed on the assumption that it is not one of Turkish law. If, however, the Court should think it is, then *Smith* v. *Gould* (3) shews that the burden of proving what that law is lies, not on us, but on the Defendants, who rely on it. But the inconvenience of treating this case as governed by Turkish law, affords a strong argument that it is not to be so dealt with. The company's business offices are in *London*, though the subjects of its administration are at *Smyrna*, or elsewhere out of *England*. If Turkish law is to be applied, the Defendants, in an action on bonds issued by the administration here, would insist that they could not be sued in this country; and if proceedings were taken on such bonds in *Turkey*, the Defendants there would plead that they must be sued upon here. But the Plaintiff is suing the directors of the company, and not the company, except in a technical sense; and as the parties, *i.e.* the Plaintiff and directors, are all resident here, the objection to the jurisdiction of the Court cannot prevail.

Then the Defendants say, that what has been done has been ratified and acquiesced in by the Plaintiff, and they rely for that on the statutes of the company. But there is nothing in the statutes which authorizes the directors of the company who have received money for one purpose to apply it to another, nor anything to make the prosecution of a man for a libel, not on the company, "an affair of the company." Art. 40 of the statutes, clauses *n.* and *o.*, relate only to "the company," not to wrongful acts done by the directors, of whom alone the Plaintiff now complains. So also as to Arts. 60 and 61. Then as to the misjoinder——

The VICE-CHANCELLOR:—You need not trouble yourself about that.

(1) 14 Beav. 367; 2 D. M. & G. 49.] (2) Law Rep. 10 Eq. 367.
(3) 4 Moo. P. C. 21.

Mr. *Lindley*:—Very well. Then the whole case—if we are right as to the jurisdiction of this Court, which we submit we are—resolves itself into this: that this application by the directors representing the company of money belonging to it, in payment of the costs of a libel, not on the company but on the directors of it, is *ultrà vires* the company; and therefore the Plaintiff is entitled to the declaration, and the other relief for which he prays.

May 7. SIR JOHN WICKENS, V.C.:—

The Plaintiff in this case is a shareholder in an association incorporated by a firman of the Grand Seigneur for the purpose of making a railway from *Smyrna* to *Aidin*. He sues on behalf of himself and all other the shareholders in the association except the Defendants, and seeks an injunction to restrain the members of the council general, or, in other words, the directors, from paying certain costs out of its funds; and an order upon them to restore what has been already paid for costs similarly incurred. The members of the general council and the company, as a corporation, are the Defendants. The firman constituting the association is dated in December, 1856. It is, of course, in Turkish, and was preceded by a document in the same language, which is called indifferently a concession and a convention. This latter is an agreement between three Turkish Ministers of State on behalf of the Government, on the one part, and the attorney of four persons, described as founders of the company, on the other part; and is, in fact, an ordinary concession of the privilege of making a railway and electric telegraph from *Smyrna* to *Aidin*, with a power to take Government land gratuitously, and other land compulsorily on payment; and other very valuable concessions, including a guarantee of interest. The 24th article of the concession authorizes the raising of the necessary capital by the issue of shares, of which one-fourth is to be reserved for Turkish subjects; and the 25th article provides for the preparation of statutes to be approved by the Turkish Government. The statutes, which are in Turkish, like the concession and firman, are very much in the form of ordinary articles of association in a limited English company. Some

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passages of them were relied on at the hearing, and may be adverted to here. [His Honour then referred to the statutes, articles 1, 2, 3, 21, 30, 40, 43, 44, 60 and 61, *ut supra*, and continued:—] The costs, with regard to which the question in this case has arisen, are the costs of an indictment for libel against a Mr. *Ellissen*, himself a shareholder in the company, and the honorary secretary of a committee of shareholders appointed on the 2nd of June, 1868, to watch the proceedings of the directors. There had been, it seems, a committee of investigation appointed in the previous year, but that committee, which was appointed by and reported to the general meeting of the association, was distinct and different in its nature from the committee which came into existence in June 1868. Mr. *Ellissen*, as secretary of the latter, wrote and sent to Lord *Stanley*, then Her Majesty's Secretary of State for Foreign Affairs, in August and September, 1868, certain letters, of which the object seems to have been to enlist such influence as the English Government might have with the Turkish Government against the then council of administration of the association, or at least to prevent its being used in their favour. The letters contain imputations on the council of administration, which are couched in strong and offensive language, and of which a subsequent explanation, that the imputations were made on them in their official and not in their individual characters, seems a lame and not satisfactory withdrawal. On the 30th of September, 1868, at a general meeting of the company, a resolution was proposed requesting the directors to adopt the strongest possible measures to put a stop to the mischievous action of the committee of consultation. This, it will be understood, was a mere expression of opinion, and not a formal resolution, as the notice required by the statutes for formal resolutions had not been given. Shortly after that the council of administration instituted the proceedings already mentioned. The case was tried at the Central Criminal Court, when the jury, being unable to agree, were discharged. It was then removed by *certiorari* into the Court of Queen's Bench, and tried before a special jury with a similar result. On two other occasions it had been opened before a special jury, but without result; the proceedings remaining incomplete on one occasion, from the illness of a juryman, and on another from want of time. Of the costs incurred by

the prosecutors in those proceedings, some part had been paid before the half-yearly general meeting, held on the 31st of March, 1871, and accounts embodying that payment were sanctioned by the meeting, after attention had been expressly called to it, with no dissentient voice but that of the Plaintiff; and it is not denied that the rest of the costs already incurred, as well as of those of the further proceedings in the matter, are intended to be paid in like manner. The question raised by the bill is whether this is lawful, or whether such a payment is so inconsistent with the objects and spirit of the partnership that no majority of shareholders, however great, can bind the minority to it? Unless this is established, the Court, according to *Foss* v. *Harbottle* (1), would decline to interfere. The association in this case is one of which the rights of members as between themselves must be taken to be governed by Turkish law. The association is created by the Sultan's firman, and regulated by statutes which were submitted to, and sanctioned by, the Turkish Government. The contracts of the shareholders were, no doubt, actually executed in various places; but the bond between them was intended to be Turkish, and the corporation was to have its seat in the Turkish dominions, and to carry on its operations there, though its governing body was to be in *England*. The rights of the members of the association as between themselves are therefore to be determined by the Turkish law. How the Courts of *England* act in construing a foreign contract or other document is laid down by Lord *Cranworth* in *Di Sora* v. *Phillips* (2). Lord *Cranworth* says: "What are the rules by which an English Court ought to be governed in construing a foreign contract? When a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and, fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction." And those rules are explained to the same effect, but more fully in the judgment of the Vice-Chancellor in the same case (3). The prin-

(1) 2 Hare, 461. (2) 10 H. L. C. 624, 633. (3) 10 H. L. C. 629.

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ciple of jurisprudence which I am asked here to apply is, that the governing body of a corporation, that is in fact a trading partnership, cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not, of course, mean exclusively either directors or a general council; but the ultimate authority within the society itself, which would ordinarily be a majority, at a general meeting. According to the principle in question, the special powers, given either to the directors or to a majority, by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence. Possibly in this or that system the line may be drawn more or less sharply by decisions. It is difficult to conceive any system of jurisprudence in which *Natusch* v. *Irving* (1) would have been differently decided; though not difficult, perhaps, to conceive that foreign tribunals might have come to a different conclusion in some of the cases in which English Courts have restrained the acts of incorporated partnerships as being *ultrà vires*. But though the rights which I have to deal with are rights regulated by Turkish law, the general principle assumed to be common to all systems must be applied by me in the way in which I find it to have been applied by the English Courts. The case would be otherwise if it were shewn that the course and habit of Turkish Courts has been to apply it differently. It cannot be right to say that the principle is universal; but that a particular application of it is particular and municipal, unless and until the fact is proved. In this case there is no evidence of the foreign law on the point; and it follows from what I have said, that the question must be decided here exactly as it would have been decided if this had been a purely English company. It seems to me that where a *quasi* partnership of this sort is divided into a majority and minority who differ on a question of internal administration, and litigation results from

(1) 2 Coop. C. C. 358.

the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund; and that this is independent of the question whether the majority is overwhelming or a bare majority. Of course any shareholder, or number of shareholders, may deal with the company as a stranger, and litigation arising out of such dealings will none the less be the act of the company as a whole, because it is against a member or members of it. And it may be difficult to say exactly where the line runs in such a case; as, for example, in *Kernaghan* v. *Williams* (1), which was cited in the argument. But the proposition stated above seems to me, nevertheless, to be *primâ facie* true. It is said that in this case the litigation was intended indirectly to benefit, and did actually benefit, the company as a company seeking to attain its proper and legitimate objects. That could probably be said with almost equal truth wherever the object and effect of the litigation is to silence the minority and leave the majority supreme. In this case the indictment was avowedly intended to prevent the minority from objecting to the course taken by the general council (supported by a majority) in dealing with the company's funds; or, in other words, to preclude the action of the minority as dissentients. Had that action been confined to what may be called constitutional opposition, and had the attempt been to silence that, the question whether the costs of a litigation with such an object could be paid out of the general funds of the association would not have been arguable; and I think that the form of opposition, whether by appeal to the public, or to the Turkish Government, or to the English Government as having influence on the Turkish Government, affords no satisfactory ground of distinction. The question which was right and which was wrong on the point at issue, or even that of the propriety of the particular mode of raising it, or of that adopted for stopping the discussion, seems to me immaterial. I hold, therefore, that the Plaintiff is substantially right in his contention, that the payment of these costs is *ultrà vires* of the majority.

It remains to consider whether the directors should be personally decreed to refund what has been already paid in respect of them.

(1) Law Rep. 6 Eq. 228.

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That the position of the directors in an association like this is fiduciary cannot be doubted; and that the Court might compel the refunding by them to the company of money misapplied by them, though in no way appropriated to their own use or for their own purposes, is clear. But unquestionably the position of directors in this respect is very different from that of ordinary trustees. I see no reason to doubt that these directors, or the majority of them who acted in the matter, sincerely believed that in doing what they did they were giving effect to the informally expressed but palpable wishes of a large majority of their constituents, whom it was their *primâ facie* duty to obey; and that they acted in good faith, without knowledge or suspicion that it would be unlawful for them to seek from the company's funds indemnity for their expenses incurred in the company's service. All that, however, would amount to little or nothing if the question was as to the replacing of a trust fund lost by the honest mistake of a trustee, properly so called; but it is very material when the question is whether the Court is actually bound to decree repayment by *quasi* trustees of a sum, which, though not inconsiderable to individuals, can only benefit infinitesimally the comparatively few shareholders entitled to complain of it. I think the Court is not so bound in every case where directors have spent money in error; and, in fact, although these cases have been very common, a decree for such a repayment has been rarely made. In any case, I should not, I think, have disturbed payments made before the bill was filed; but it seems better to disturb none. The decree will therefore be confined to a perpetual injunction as prayed; and, thinking as I do, that the point was not expressly governed by any reported case, unless *Kernaghan* v. *Williams* (1) be an exception, that the alleged libels were unjustifiable in tone even if justifiable in substance, and that the Plaintiff's position is not quite that of a disinterested shareholder complaining that the spirit of the association is violated by the proceedings in question, no costs will be given.

Solicitors for the Plaintiff: Messrs. *Elmslie, Forsyth, & Sedgwick.*
Solicitor for the Defendants: Mr. *George Rooper.*

(1) Law Rep. 6 Eq. 228.

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1872

May 25.

[1872 B. 112.]

Will—Gift of Residue to Legatees named, and to their Executors, Administrators, and Assigns—Declaration that the Shares should be vested on Execution of Will—Death of Legatee before Testator—Lapse.

4 Ch. D. 167,

Testator gave, by will, the residue of his estate to trustees to pay and transfer the same unto seven legatees named, in equal shares as tenants in common, and their respective executors, administrators, and assigns, to whom he bequeathed the same accordingly; and he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women should be for their separate use :—

Held, on demurrer, that the share of one of the legatees—a married woman —who died after the date of the will but before the testator, did not belong to her husband, her legal personal representative, but that it had lapsed.

THE Rev. *William George Sawyer*, by will dated the 23rd of November, 1869, after making certain specific bequests, and giving and devising real and personal estates to trustees for sale and conversion, and after directing payment out of the proceeds of sale and conversion of other legacies, and some annuities, devised a messuage, and land, and hereditaments, at *Old Dalby, Leicestershire*, unto and to the use of the Rev. *Robert Coalbank* and his successors, incumbents or ministers of the church of *Old Dalby*, and he declared that as to the residue of the moneys to arise from the sale and conversion of his said real and personal estates, "My trustees or trustee shall pay and transfer the same unto *Charles Hope; Eliza*, the wife of *Andrew Inglis; Catherine Hope*, and *Louisa Hope*" (the four children of General *Frederick Hope*), "and to *Selina*, the wife of *Thomas Edmund Franklin; Charlotte*, the wife of the Rev. *Samuel Benjamin Browne*, of *Hope Mansell*; and *Fanny Hope*" (the three children of Captain *George Hope*); "in equal seventh shares, as tenants in common, and to their respective executors, administrators, and assigns, to whom I bequeath the same accordingly; and I declare that such shares shall be vested interests in each of my said residuary legatees, immediately upon the execution hereof, and that the shares of such of them as are married women shall be for their own sole and separate use and disposal, and be free from the debts, control, or interference of their respective husbands."

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By a codicil dated in July, 1870, the testator devised the advowson of the vicarage of *Old Dalby* to trustees upon trust to induct the Rev. *Robert Coalbank*, whom he described as "the now curate or assistant minister" of the church of *Old Dalby*, if he should be living at the testator's death, and after referring to the devise in his will to the Rev. *Robert Coalbank*, the testator said, "I hereby declare that the said devise of the messuage, land, and hereditaments, was intended to operate, and shall take effect, as if the said *Robert Coalbank* had previously to my death been appointed and inducted into the said vicarage of *Old Dalby*."

The testator died in May, 1871. *Charlotte*, the wife of the Rev. *S. B. Browne*, died in September, 1870, and he, as her legal personal representative, filed this bill, praying for a declaration as to the rights and interests of the several parties in the one-seventh part of the residuary estate which was primarily intended for the said *Charlotte Browne*, and for consequential relief.

The cause came on to be heard on a general demurrer for want of Equity by the first two Defendants, who were respectively the sole next of kin and the heir-at-law of the testator.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Cadman Jones*, for the demurring Defendants:—

The object of this demurrer is to obtain a declaration that the Plaintiff has no title under the will to the one-seventh share which was given to his wife who died in the testator's lifetime. The Plaintiff insists that there was no lapse; but the use of the words "executors, administrators, and assigns," does not prevent a lapse. It is also insisted that this was a vested interest, in consequence of the use of the words "immediately upon the execution hereof;" but no one can take an interest under a will until the person who makes it be dead. There can be no vesting earlier than that event. The law is well and strictly settled as regards lapse. There must be clear words to prevent it, and there is nothing in this will to prevent the ordinary doctrine applying.

Sir *Roundell Palmer*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

The question is, whether the testator has sufficiently shewn an

intention that there should be no lapse, but that the executors or administrators should take, in the event of death in his lifetime, and it is submitted that both on principle and authority he has done so. It is suggested, that the words "immediately upon the execution hereof," do not mean what they say. For what purpose were those words used? The gifts were not to persons contingently as to a class; nor upon the fulfilment of a condition, such as marriage or age, or the like. The gifts were immediate and absolute; for the testator said, "I declare that such shares shall be vested interests in each of my said residuary legatees immediately upon the execution hereof." The gifts were not only to individuals, but to them and to their executors, administrators, and assigns, to whom he "bequeathed the same accordingly." If the construction suggested for the demurring Defendants be adopted, these latter words will be rendered nugatory. The language of the codicil in reference to the advowson evidently shews that the testator desired to secure the legal fulfilment of his object—that all the gifts should take effect as if they vested upon his death. The intention is expressed in words equally as clear in *Sibley* v. *Cook* (1), where the gift was to the legatee and "to her executors or administrators," and it was held that the legacy did not lapse. In that case the words were negative; here they are affirmative. In *Sibthorp* v. *Moxom* (2) there was the same result, and the words here—the sole question being one of intention—are at least as strong, if they are not stronger than in that case. The same principle was acted upon in *Philips* v. *Philips* (3) and in *Bridge* v. *Abbot* (4), where there is an allusion to *Sibley* v. *Cook*. The precise object of the testator will be accomplished by the construction which the Plaintiff contends for; *i.e.*, that there is no lapse, but that the executors, administrators, or assigns take the gift as part of the estate of the deceased legatee whom they represent; the intention being to add it to her estate. A gift to executors and administrators is not to be read as a gift to next of kin: *Daniel* v. *Dudley* (5). In that case there was a marriage settlement, and the property passed to the legal representative of the wife. *Attorney-General* v. *Malkin* (6), *Mackenzie* v.

(1) 3 Atk. 572.
(2) Ibid. 580.
(3) 3 Hare, 281.
(4) 3 Bro. C. C. 224.
(5) 1 Ph. 1.
(6) 2 Ibid. 64.

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Mackenzie (1), and *Re Seymour's Trusts* (2), are cases also in point, and so is that of *Long* v. *Watkinson* (3), and it is submitted that the Plaintiff's contention is a perfectly consistent and rational one. If the words can be construed as shewing an intention to substitute the executors, administrators, or assigns in case of death—the purpose being clear and the means of accomplishing it—why should the Court be astute to defeat it? The gift in this case is to the legatees "and to their respective executors, administrators, and assigns."

But the addition of the word "assigns" is immaterial. It primarily indicates assigns after death; but it is not unreasonable to say that a legatee is an assign. One of these legatees may have entered into a contract, and it follows from the decisions in *Long* v. *Watkinson* and *Daniel* v. *Dudley* (4), that the legacy would be liable to all the dealings with it by the person to whom it was given. In either case the construction is the same: *Grafftey* v. *Humpage* (5); *Holloway* v. *Clarkson* (6); *In re Walton's Estate* (7).

The use of the word "assigns" is simply corroborative of the plain intention of the testator that there should be no lapse, and therefore it is submitted that the Plaintiff, as the legal personal representative of his deceased wife, is entitled.

[They also referred to *Corbyn* v. *French* (8).

The *Solicitor-General*, in reply:—

There must be two things: a clear intention that there shall not be a lapse, and a clear indication of the person to take in case of prior death.

Corbyn v. *French* is not in the Plaintiff's favour. There is not that clear indication upon the face of this will which is requisite. In *Sibley* v. *Cook* (9) there was a gift, in case any of the legatees should die, to the executors and administrators. It may be doubted, however, whether that case is, upon the whole, an

(1) 3 Mac. & G. 559.
(2) Joh. 472.
(3) 17 Beav. 471.
(4) 1 Ph. 1.
(5) 1 Beav. 46–52.
(6) 2 Hare, 521.
(7) 8 D. M. & G. 173.
(8) 4 Ves. 418.
(9) 3 Atk. 572.

authority in this one; and it must be observed that the decision in that case was upon the authority of *Darrel* v. *Molesworth* (1), which, it is submitted, has been overruled. A mere declaration that there shall be no lapse is not sufficient. It does not, by implication give it to somebody else.

[He cited *Williams* on Executors (2) and *Toplis* v. *Baker* (3).]

SIR JOHN WICKENS, V.C.:—

4 Ch D. 167

It is, I think, quite clear, that a testator may prevent a legacy from lapsing; but the authorities shew that in order to do that he must do two things: he must, in clear words, exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his lifetime. The first part of the gift in this case, in which, it may be observed, there are unnecessary words of limitation, would unquestionably not exclude lapse. Even if the words in reference to the vesting of the interests were a sufficiently clear indication of intention that there should be no lapse, yet they only supply the first of the two requisites, and consequently the second must be supplied, if at all, by extracting from the superfluous but not unusual words in the first part of the gift something to import into the second a substitution, in case of the legatee's death in the testator's lifetime. I think that that would be an entirely unsound construction, and therefore I must allow the demurrer.

Solicitors for the Plaintiff: Messrs. *Ravenscroft & Hills.*
Solicitors for the demurring Defendants: Messrs. *Tucker & Lake*

(1) 2 Vern. 378. (2) Vol. ii. 6th Ed. 1123.
(3) 2 Cox. 118.

V.-C.W.
1872
May 30.

RADDE *v.* NORMAN.

[1872 R. 61.]

Trade Name—"Leopoldshall"—Injunction.

The name of the place of origin of an article may become a trade-mark Consideration of the kind of evidence necessary to support an interlocutory injunction in such a case.

18 Eq 141
7 L.D. 806.

MOTION.

In 1859 the Ducal Government of *Anhalt* discovered at *Leopoldshall*, in the territory of the duchy, near the Prussian town of *Stassfurt*, a valuable mine of rock salts, containing in particular a crude or native salt called "Kainit," peculiarly rich in sulphate of potash, and thereby and otherwise very valuable as a manure. In August, 1869, the Plaintiffs analysed it, and published in *England* and *Ireland* a circular, bringing it under the notice of the public by the name of "Kainit" alone. Shortly before the 30th of April, 1870, the Ducal Government granted the exclusive right of exporting over the sea genuine Kainit out of the mines to Mr. *Gustav Ziegler*. On the 30th of April, 1870, the notification of that grant was published, and on the same day *Gustav Ziegler* conferred such exclusive right upon the Plaintiff *Otto Radde*. The government notification and memorandum conferring such exclusive right on the Plaintiff, *Otto Radde*, was as follows:—

(Translation.)

"Notice is hereby given, that the Ducal *Anhalt* Government Department for Forests and Mines have awarded to Mr. *Gustav Ziegler*, of *Dessau*, the exclusive right of exporting over the sea genuine Kainit, in its raw, ground, or unground state, wrought and gotten out of the Ducal mines at *Leopoldshall*, and have closed an especial contract to this effect with Mr. *Gustav Ziegler*.

"*Dessau*, April 30th, 1870."

"The Ducal *Anhalt* Government Department of Forests and Mines,

"*Steinkopff*.

"Memorandum.

"Referring to the above notice, I hereby confer upon Mr. *Otto*

Radde, of *Hamburg*, the exclusive right of exporting genuine Kainit from *Leopoldshall* over the sea, especially to *Great Britain* and *Ireland*.

"*G. Ziegler.*"

The translation of the notification and memorandum were, in the month of July, 1870, printed and circulated by the Plaintiffs in this country. In that circular the word "*Leopoldshall*" was placed in a single line in large type, and the circular particularly referred to "the genuine Kainit" as coming from the Ducal mines at *Leopoldshall*. In 1869, when Kainit was first introduced, no one was offering or selling an article under that name; but spurious imitations having afterwards appeared, the Plaintiffs thereupon adopted the distinctive name "*Leopoldshall*" for the Kainit supplied by them. The Plaintiff *Otto Radde*, acting under his aforesaid rights, exported large quantities of the genuine *Leopoldshall* Kainit to the *United Kingdom*, and, in co-operation with the Plaintiff *Emil Meyerstein*, his agent here, established a profitable sale for his Kainit. Before the filing of the bill in this suit they had distributed 127,000 circulars and books of various kinds relating to it; had advertised it almost constantly in more than thirty newspapers; and had sold about £500 worth by March, 1870, £15,000 worth by the end of that year, and £30,000 worth in 1871. In June, 1870, the Plaintiffs circulated a "caution," stating the sole right of the Plaintiff *Otto Radde*, and warning all persons against selling the genuine *Leopoldshall* Kainit without a license. Ever since June, 1870, the Plaintiffs had always advertised and sold their Kainit as "genuine *Leopoldshall* Kainit." It was imported and used as a crude salt in its native state, being only ground fine for the purpose of sowing it on the land. It contained from 24 to 32·60 per cent. of sulphate of potash, the guaranteed minimum being 23 per cent.; and contained also sulphate of lime, sulphate of magnesia, chloride of magnesium, and common salt. It was a most valuable manure, especially for light soils, when used in combination with nitrogenous and ammoniacal manures. The native salt did not diliquesce, and might therefore be stored without inconvenience. The *Leopoldshall* mines were the only mines where the genuine native Kainit could be obtained in sufficient and regular supplies. Many inferior salts and compounds had

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been introduced and sold under the title of "Kainit," but "the genuine *Leopoldshall* Kainit," imported by the Plaintiffs exclusively, was well known in the trade as the product of the *Leopoldshall* mines; was distinguished by the name "*Leopoldshall*" from all other kinds of Kainit; and the Plaintiffs claimed an exclusive right to the use of the word "*Leopoldshall*" as applied to Kainit.

In March, 1872, the Defendants issued the following circular or document:—

"Kainit. [*Leopoldsalt.*]

"We are offering a good lot of above, testing 24 per cent. sulphate of potash, at £3 per ton, net cash, free to carriers in bags, and shall be glad of orders per return.

"*Norman & Pigott.*

"37, *The Albany, Old Hall Street, Liverpool,*
14th February 1872."

On the 22nd of March, 1872, *Thomas Pugh*, a customer of the Plaintiffs, wrote to the Defendants as follows:—

"Please send me sample, analysis report, and price per ton on rails in bags for *Leopoldshall* Kainit."

On the 23rd of March, the Defendants sent the following answer to that letter:—

"Mr. *Thomas Pugh.*

"Dear Sir,—In reply to your esteemed favour, we beg to quote inclosed sample *Leopoldsalt* Kainit, £3 per ton in bags per rail, net cash, and shall be glad of orders.

"Yours truly,

"(Turn over.) "*Norman & Pigott.*

"We have no further guarantee than the test, which is 24 per cent. sulphate of potash."

The Plaintiffs alleged that the article so brought into the market and sold by the Defendants was very inferior in quality to the genuine *Leopoldshall* Kainit; that it could not be sold except by means of deceiving the public and injuring the Plaintiffs; that the Plaintiffs had in fact sustained considerable pecuniary loss by such sale; and that, as no person, except the Plaintiff *Otto Radde*, had any right to export genuine crude Kainit from *Leopoldshall* over the sea, the genuine article could not be obtained

in this country (except by means of fraud) from any person but the Plaintiffs, and persons by them lawfully authorized. The Plaintiffs had not, nor had either of them, ever given any consent to the Defendants, or either of them, to sell Kainit, or use the word *Leopoldshall*.

The cause came on to be heard on a motion for an injunction to restrain the Defendants from issuing or circulating the aforesaid circulars, or any similar circulars or documents, and from using the words *Leopoldsalt* or *Leopoldshall*, or any colourable imitation of *Leopoldshall*, in connection with Kainit brought into the market by them; and generally from doing any act or thing representing or calculated to induce the belief that the Kainit offered for sale by the Defendants was the product of the *Leopoldshall* mines, or was the Kainit imported by the Plaintiffs into this country. The Plaintiffs' evidence was an echo of the bill in the suit, and to the effect above stated.

The Defendants deposed that the Kainit which they offered for sale was purchased by them in the market as genuine *Leopoldshall* Kainit, and that they intended to sell it as such; that the word *Leopoldsalt* in their circular and letter was a mere oversight occasioned by their want of familiarity with the German language, and by the fact that the article sold was a salt. They said they fully believed it to come, and intended to sell it as coming from the *Leopoldshall* mines, in the Duchy of *Anhalt*. The *Leopoldshall* Kainit was an article of trade both in *England* and on the continent. In the list of the current prices at *Hamburg* on the 6th of May, 1872, *Leopoldshall* Kainit was included, and, as they believe, was commonly included in documents of the like nature. They further said that they purchased their *Leopoldshall* Kainit in good faith; that they were informed and believed that whereas the alleged right of the Plaintiffs extended only to the exportation of Kainit in its raw state, any subjects of the Ducal *Anhalt* Government were at liberty to export it in its calcined or manufactured state; and that the Plaintiffs had no exclusive right to the Kainit wrought or gotten from the said Ducal mines; but that, on the contrary, the Ducal Government was under contracts to supply the same to many other firms in the Duchy. They believed that the Kainit which they offered for sale in manner aforesaid

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was genuine *Leopoldshall* Kainit in a calcined or manufactured state; and they never either intended to sell or did in fact sell it as being the Plaintiffs' genuine *Leopoldshall* Kainit. They believed that there was, in fact, a considerable quantity of genuine *Leopoldshall* Kainit in the English market (both in a manufactured and in a raw state) not exported by the Plaintiffs. The Defendants, in the earlier portions of their evidence, deposed to their want of knowledge of the Plaintiff *Otto Radde's* title; but the statements then made by them were subsequently amended.

The Plaintiffs, in reply, stated that there never had been any genuine *Leopoldshall* Kainit in the English market not exported by the Plaintiffs; and that such an article always had been and was unknown in the market; that if the Plaintiffs had ever become aware of the sale of such an article, they would at once have taken measures to restrain the sale; and they also stated that *Leopoldshall* was the name of a mine only, and was not a district or town, or even a village.

Mr. *Karslake*, Q.C., and Mr. *Colt*, for the Plaintiffs:—

The first question in this case is, Is the word "*Leopoldshall*" a trade-mark? We say it is: *M'Andrew* v. *Bassett* (1); *Wotherspoon* v. *Currie* (2); *Joyce* on Injunctions (3). The second question is, Have the Plaintiffs the exclusive or sole right of "selling" their Kainit in this country? The evidence shews that long ago the Plaintiffs' industry enabled them, and them alone, to procure from the *Leopoldshall* mine Kainit in a crude state. They then also obtained a grant of the exclusive right to export that article from *Anhalt*, and to import it into this country. Those facts establish their absolute ownership of the genuine crude Kainit in this country as against every one else. They have, therefore, a perfect right to prevent any one from selling what purports to be their Kainit. To achieve that they use the word "*Leopoldshall*." It will inflict no hardship on the Defendants to grant this injunction, because they can easily so describe any Kainit sold by them as not to interfere with the "genuine *Leopoldshall* Kainit" sold by the Plaintiffs.

(1) 33 L. J. (Ch.) 561. (2) Law Rep. 5 H. L. 508.
(3) Vol. i. 347.

The last question is, Have the Defendants infringed the trade-mark of the Plaintiffs? Their circular shews that they have. It was evidently framed for the purpose of deceiving the public. The word "*Leopoldsalt*" was intended as, and is, a close and colourable imitation of *Leopoldshall*, and is meant to lead buyers to suppose that they are purchasing the genuine native salt obtained from the mine at *Leopoldshall*. Unless such be the intention, the use of the word "*Leopold*" is wholly unmeaning and cannot be accounted for. The Defendants' letter of the 23rd of March, 1872, was written in reply to an application for *Leopoldshall* Kainit, which such reply treats as the same article as *Leopoldsalt* Kainit." The expressions as to the guarantee in the letter shew clearly that the thing to be guaranteed was—that the article sold was—Kainit from the *Leopoldshall* mine, which commonly contains the minimum proportion of 24 per cent. of sulphate of potash, and is well known in the trade. Resting our case merely on *M'Andrew* v. *Bassett* (1), the Plaintiffs are clearly entitled to an injunction.

Mr. *Greene*, Q.C., and Mr. *B. B. Rogers*, for the Defendants:—

The Plaintiffs here seek to carry the doctrines of this Court far beyond their proper limit; and the cases cited do not apply to the present one. The Defendants' case is, that the Kainit which they sold was bought by them in the market as genuine *Leopoldshall* Kainit; that they intended to sell it as such; and that the use of the word "*Leopoldsalt*" was the result of inadvertence on their part. They say that they "fully believed, and fully believe it to come, and intended to sell it as coming, from the *Leopoldshall* mine in *Anhalt*." Unless the Plaintiffs can shew *mala fides* on the part of the Defendants, the injunction cannot be granted; but it is impossible to gainsay the *bona fides* of the Defendants.

[The VICE-CHANCELLOR:—Why do they not say precisely where in fact they got the Kainit which they sold?]

They do say where they got it, viz., in the market. But the Plaintiffs have not shewn a proper title to their Kainit. It is not, as here, alleged on the pleadings that their Kainit can only be got at the Ducal mines, nor do they say that the Defendants' is

(1) 33 L. J. (Ch.) 561.

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not from *Leopoldshall*, *i.e.*, the same "place." If it is, there is no deception on their part; and if it is not, the Plaintiffs have no case.

Then, again, the Plaintiffs are selling the raw or crude Kainit; the Defendants are selling the calcined or manufactured article. What they are selling is not, therefore, the same thing as that which the Plaintiffs (even on their own shewing) profess to import into this country. The calcined or manufactured article can be bought abroad at any moment; and if so, there is nothing to prevent its being sold here.

Wotherspoon v. *Currie* (1) is distinguishable from this case. "Starch" is the same thing everywhere all over the world; but the Plaintiffs cannot pretend that they have so large a title as that to their Kainit. *M'Andrew* v. *Bassett* (2) is a different case. If the Plaintiffs here are right, the Defendants must, although their description of their own article denotes correctly what it is, add other words to shew that "it is not the Kainit of *Otto Radde*." But that is never required in these cases.

Then the evidence here proves, beyond a doubt, that the public have never really been deceived by the articles sold by the Defendants. The Defendants never have used the Plaintiffs' trade-mark, even if the word "genuine" imports "crude." There has been no infringement of it by the Defendants; they have never used that word, but have throughout adopted their own description, and not that of the Plaintiffs. Moreover, it is a well-known fact that many other merchants have long sold and still sell with impunity the same sort of article as the Defendants. Unless, therefore, the Plaintiffs can prove that what the Defendants do sell is in all respects identical with the Plaintiffs' "crude Kainit," there is no ground for an injunction. In fine, we say the Plaintiffs have not proved that the Kainit of the Defendants does not come from these mines; and even if they had proved that, they would not have been entitled to the order they now move for.

SIR JOHN WICKENS, V.C.:—

The Plaintiffs seem to me to have established a *primâ facie* case to treat *Leopoldshall* as denoting in the English market the un-

(1) Law Rep. 5 H. L. 508.

(2) 33 L. J. (Ch.) 561.

adulterated article imported by M. *Radde*. No doubt that is a very difficult sort of title to establish, and it is not necessary now to say that it is definitively established. That is a matter for the hearing. But the evidence before me of practical men and persons engaged in the trade is substantially uncontradicted, as I understand it, and is of unusual strength. The Defendants have clearly used the name of *Leopoldshall*, or an imitation of it; and have not attempted to shew, or at any rate have not shewn, that they had any excuse whatever for so doing. There is nothing in the evidence that I can see to lead to a serious belief that they have used this name *bonâ fide*. Their evidence upon the point really comes to nothing. It is utterly vague as to the persons from whom, the times at which, and the representations under which what they sell as *Leopoldshall* was purchased; and the mis-spelling of the word is, to say the least, as suspicious a circumstance as can be conceived. No doubt if they had shewn that the Kainit which they offered for sale was really the *Leopoldshall* Kainit, or even had been bought by them under circumstances which led them to believe it was really *Leopoldshall* Kainit, they would have been in a very different position. But in a case of this sort, mere allegations that they purchased it as genuine *Leopoldshall* Kainit, or that they purchased it in good faith, or that they believed it to come from the *Leopoldshall* mine in a calcined or in a manufactured state, must go for nothing. I must treat the case, therefore, as one in which the Plaintiffs have estsblished *primâ facie* what I admit to be a very difficult title to establish, a title to the exclusive use of a particular word as a trade-mark; and that the Defendants have used the same word without any justification or excuse. If they intended to assert by the affidavits that they were unacquainted with the Plaintiff's use of the title, or his circulars or advertisements, or of the terms which he had applied to it in using the circulars and advertisements, they have certainly failed to do so distinctly. There is not a word to that effect in their first affidavits, and if the allegations as to knowledge in their second affidavits are intended to convey that, it is very unfortunately expressed. Unquestionably the deponents knew in 1869 that *Radde* professed, whether rightly or wrongly, to be the only shipper of genuine *Leopoldshall* Kainit, although the statement in terms

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seems to deny that; and it may therefore well be that other things are true which the same allegation seems *primâ facie* to deny. It is quite obvious that much less absolute proof of the Plaintiffs' title is required where there is reason to doubt the Defendants' good faith. Here they swear to that good faith in so many words, but give the Court no reason whatever to believe in it; and certainly considerable reason for doubting it. No doubt the Plaintiff's title, although much more satisfactorily proved than it was when a previous case (1), founded upon the same or a similar title, was before me, may still be open to much question. I by no means decide that even as now proved, it would be sufficiently established as against a person who, in ignorance of any claim upon *Radde's* part, had sold or offered for sale raw *Leopoldshall* Kainit—Kainit which he had lawfully got into his possession with good reason to believe that it was what he described. But it seems to me that the title is so sufficiently established as to authorize me, on an interlocutory application, to grant an injunction against persons who, when challenged, say no more in their own favour than the Defendants have said in this case. I shall therefore grant the injunction moved for; omitting, however, from the order the words "the product of the said *Leopoldshall* mines."

Solicitor for the Plaintiffs: Mr. *T. J. Holmes.*
Solicitors for the Defendants: Messrs. *Cree & Last.*

(1) *Radde* v. *Knoblauch*, May 22, 1872.

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[1850 R. 75.]

Succession Duty—16 & 17 *Vict. c.* 51, *s.* 2—*Entitled "upon" the death of any person.*

A testator died in 1850, having devised his real estates to trustees upon trust to accumulate the rents for twenty-one years, and then to convey and assure the estates and accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving a heir at law who died in 1865. Four co-heiresses of the testator succeeded to the property in 1871:—

Held, that succession duty was payable.

Attorney-General v. *Gell* (1) commented on but followed.

PETITION.

Richard Ring, by his will, dated the 25th of March, 1850, devised and bequeathed all his real estates to trustees upon trust, as to the rents and profits thereof for and during the term of twenty-one years to be computed from the time of his death, to receive and stand possessed of and apply and lay out and invest the whole of such rents and profits, as the case might be, in the purchase of freehold and copyhold lands or other hereditaments in *England* or *Wales*, held for an estate of inheritance in fee simple, to be conveyed and assured to the use of the trustees for the time being of that his will, their heirs and assigns, upon the trusts expressed concerning the real estates thereby devised; and he declared that in the meantime, until the moneys should be so laid out, the same should be from time to time invested by the trustees for the time being in their own names in the £3 per Cent. Consolidated Annuities, in the £3 per Cent. Reduced Annuities, or on mortgage, or on any real securities in the *United Kingdom*, which funds and securities might be changed and varied as often as should be deemed expedient, and the dividends, interest, and annual produce thereof should from time to time be applied in such and the same manner as the rents and profits were thereinbefore directed to be applied, so as to form an accumulating fund in the nature of compound interest; and from and after the expiration of the said term

(1) 3 H. & C. 615. 11 Jur. N.S. 567

Appealed from but appeal abandoned
SC 21 W.R. 213, 719

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or period of twenty-one years, then the testator empowered and directed the trustees for the time being of his will forthwith to convey and assure all and singular the real estates thereinbefore devised, and also such real estates as should have been purchased and acquired by the trustees or trustee under or by virtue of the trusts and directions thereinbefore or thereinafter contained, and also all such moneys (if any) as for the time being should be uninvested in land, "to the use of the person who shall then answer the description of heir male of my body, his heirs and assigns, for ever; and if there shall be no person answering to such description, then to the use of the person or persons who shall, at the end or expiration of the said term of twenty-one years, answer to the description of heir general of my body, his, her, or their heirs and assigns, for ever: if more than one, as tenants in common; and if there shall be no persons answering to the last-mentioned description, then to the use of the person or persons who shall then answer to the description of my heir general, his, her, or their heirs and assigns, for ever: if more than one, as tenants in common; and upon, to, or for no other trust, intent, or purpose whatsoever." The testator made a codicil to his will, dated the 25th of March, 1850, but did not thereby alter the disposition of his real estate made by his will.

The testator died a bachelor on the 5th of June, 1850, and his will and codicil were duly proved on the 15th of July, 1850, by the executors and executrix therein named. At the time of the testator's death *John William Ring* was his heir general. He instituted the suit of *Ring* v. *Jarman* for the administration of the testator's estates; and decrees and orders were from time to time made therein providing (*inter alia*) for the due accumulations of the rents and profits.

John William Ring died on the 13th of October, 1865, having had one child only, a daughter, who predeceased him. On the death of *John William Ring*, his four nieces, *Sarah Payne Newcome*, the wife of *Richard Newcome*, *Anne Holder*, the wife of *William Holder*, *Caroline Head*, the wife of *Richard Head*, and *Elizabeth Godley*, widow, became, and at the end of the period of twenty-one years from the death of the testator, viz., on the 5th of June, 1871, were, his co-heiresses general. No real estate had been pur-

chased since the death of the testator; and there was now in Court a considerable fund representing the accumulations.

The four co-heiresses and their husbands accordingly presented a petition, praying (*inter alia*) for a division of the accumulation funds in Court amongst them, and for proper conveyances and assignments of the freehold, copyhold, and leasehold estates, to the trustees of the settlements of the married ladies, and corresponding assurances to the widow.

The question was whether, as the testator died before the passing of the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), any duty was payable either in respect of the estates or the accumulation of income passing to the Petitioners under the above-mentioned devise and bequest respectively.

Mr. *Dickinson*, Q.C., and Mr. *Freeman*, for the Petitioners:—

The *Succession Duty Act*, sect. 2, provides that every past or future disposition of property by reason whereof any person has or shall become "beneficially entitled" to any property, or the income thereof—on what event? Why, upon the death of any person dying. When? After the time appointed for the commencement of the Act, viz., May 19th, 1853; and subject to these additional qualifications: "either immediately or after any interval, and either certainly or contingently, and either originally or by way of substitutive limitation"—shall be deemed to have conferred, or to confer, a succession within the meaning of the Act. Are or is all or any one of those requisites to be found in the present case? Certainly not. No one was entitled to this property from the testator's death till 1865, when *John William Ring*, then his heir general, died. *John William Ring* had no interest in it whatever. If, indeed, he had not died in 1865, but had been alive at the end of the twenty-one years, he would then have answered the description given by the will; but in the meantime, as he took no interest in the property, no one became, upon his death before the expiration of the twenty-one years, beneficially, or in any way, entitled to the property. But his death is the only death since the Act. The Petitioners deduce their title through their uncle, but take the property as *personæ designatæ* at the end of the twenty-one years, by virtue of the will of a testator

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who died before the Act came into operation. There is, therefore, no succession within the meaning of the Act, and no duty payable.

No doubt the case of the *Attorney-General* v. *Gell* (1) will be relied upon by the Crown. But that case is clearly distinguishable from the present. In that case there was a tenant for life with remainders over. The tenant for life, who was entitled, died before the twenty-one years expired, and upon his death the remainderman did become entitled. But that clearly is not the case here.

It must be remembered that, irrespective of the Act, no duty is payable at all; and as the Act is one which imposes a burden on the subject, it must be construed most strictly in favour of the subject and against the Crown.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *W. Karslake*, for the Crown:—

The case of the *Attorney-General* v. *Gell* is not in fact distinguishable from this one; and moreover, the very question now before the Court was decided in it in favour of the Crown.

In that case the rents and profits of the property were left, during the joint lives of the testator's daughter and her then husband, undisposed of. The testator, however, decided that they should be accumulated for twenty-one years, if the daughter and her husband should so long live, and added to the corpus of his property. If they lived beyond the twenty-one years (which they did), then during the remainder of their joint lives they were to be paid to the person or persons who would have been entitled to the corpus if the daughter were dead without a child by her then husband. The tenant for life of the property (who was not the daughter's husband) died on the 19th of January, 1863, and the twenty-one years expired on the 25th of January, 1863. The Defendant was the second son of the tenant for life, and on his death became entitled to the property. There was in fact, as there is here, a gift of a sum of money to a person who, at the end of the twenty-one years, should answer a particular description. The circumstance that the person who answered that description then was previously a remainderman is of no consequence, because

(1) 3 H. & C. 615–628.

the true construction of the Act is that, whenever any one has or shall become beneficially entitled to any property upon, *i.e.*, by reason, or in consequence of, the death of any person dying after the 19th of May, 1853, such person so entitled must pay the duty. It is not necessary that the death should be that of a person interested in the property, or that there should be only one death. The death of a stranger, or of any number of persons, will equally effectuate the intention of the Act, which is, that on the last death duty is payable. *Attorney-General* v. *Yelverton* (1); *In re Jenkinson* (2).

If the person take the property at the prescribed time, and under a particular description, upon, or by reason, or in consequence of a death, but by a title created prior to the Act, *i.e.*, a past disposition, he takes under sect. 2 of the Act, and must pay the duty. That is the result of *Attorney-General* v. *Gell* (3).

The VICE-CHANCELLOR:—You may say, as to that case, that it admits the truth of an *à fortiori* one, viz., the one there supposed of the two rectors.

The *Solicitor-General:*—Certainly; and it is no answer to say that if the rector had been translated to another rectory the duty would not have been payable. It would not in that case have been payable, because, although there was a vacancy, there was no death; and without a death there is no succession. But that case of *Attorney-General* v. *Gell* does distinguish between a succession by reason of somebody dying and a succession on the occasion of a death. For instance, suppose a gift to a man who is Lord Mayor at the end of the year, if the Lord Mayor by due course of election dies within the year of his office, and another is appointed in his place, who is the Lord Mayor at the end of the year, he takes *virtute descriptionis*, by occasion of a death. But that is really the whole of our argument. If in this case *John William Ring* had not died in 1865, and had lived till the end of the twenty-one years, the Petitioners could not have taken this property. His death was a *causa sine quâ non*, without being a *causa causans*. *Attorney-General* v. *Gell* is conclusive as to the

(1) 7 H & N. 306, 326, 327.

(2) 24 Beav. 64–71.

(3) 3 H. & C. 615.

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point now before the Court, and binding upon it. *Wilcox* v. *Smith* (1) and *Lyall* v. *Paton* (2) shew that when the Crown succeeds it now has costs; when it fails, none.

Mr. *Dickinson*, in reply:—

This Court is not bound by the case of *Attorney-General* v. *Gell* (3), for it is not really identical with the present one.

SIR JOHN WICKENS, V.C.:—I should observe that I may consider myself all the more bound by that decision the less I may agree with it.

Mr. *Dickinson*:—I do not dispute that authority, but only say it does not govern this case.

In *Attorney-General* v. *Gell* the person who was to take at the end of the twenty-one years was—even accepting the Solicitor-General's construction of the word "upon"—ascertainable at a given moment, immediately after the death of a prior person. But how in this case could any one possibly tell, on the death of *John William Ring*, who would be entitled at the end of the twenty-one years? Suppose there was a gift of property to *A*, *B*, *C*, and *D* at the end of twenty-one years, or to such of them as should be then living. There is no gift to any of them till the end of the twenty-one years, and till that time no one can say who is entitled to the property. So here. To give the Act the construction now insisted on you must virtually insert in it the word "presumptively." The decision in the case of *Attorney-General* v. *Gell* must be taken as a whole, and so regarding it, we say it was a narrow one, and so favourable to the Crown that if a Court of Equity can see its way to a broader view of the statute, and one more favourable to the subject, it will not feel itself bound by it, but will decide accordingly. *Attorney-General* v. *Yelverton* (4) and *In re Jenkinson* (5) are also distinguishable from the present case. On the whole, we submit that the duty is not payable in this case; but if the Court should think it is payable, then it must determine who is the predecessor here. We say the testator is; but if so the case is plainly not one of a succession within the Act.

(1) 4 Drew. 40. 3 Jur. N. S. 605. (3) 3 H. & C. 615. 11 Jur. N. S. 567.
(2) 25 L. J. (Ch.) 746. (4) 7 H. & N. 306.
(5) 24 Beav. 64. 3 Jur. N. S. 279.

Mr. *Greene*, Q.C., and Mr. *Briggs*, for the trustees and executors of the will.

Mr. *Bovill*, Q.C., Mr. *E. G. White*, and Mr. *Franklen*, for the next of kin of the testator, and other Respondents.

SIR JOHN WICKENS, V.C.:—

In this case the testator, who died before the *Succession Duty Act*, directed in effect that his property should be accumulated for twenty-one years, and should then belong to the person or persons who should answer at that time the description of his "heir or co-heiresses at law."

The claimants, who are the great nieces and present co-heiresses at law of the testator, became his co-heiresses upon the death of their uncle, *John William Ring*, which took place in October, 1865.

If the matter had been *res integra* I should have thought that they did not "become entitled," in any sense whatever, upon the death of *John William Ring*; that so long as *John William Ring* lived it would be impossible that they should benefit by the gift, but that upon his death they acquired no title, either actual or contingent; and that his death only removed a person during whose existence it was impossible that the claimants should become entitled.

But the case appears to me to be covered by authority. The *Succession Duty Act* has in some cases received an interpretation, which seems not very consistent with the old canons of construction as applied to statutes laying burthens on the subject. But I am not at liberty to dissent from a decision of the Court of Exchequer upon the ground of my not being able, personally, to agree with it. Of course if I had found that the case had been insufficiently argued before the Court of Exchequer, that might have enabled me to feel more free than I do. But in *Attorney-General* v. *Gell* (1) all the arguments which have been adduced before me in this case—and which, if the matter had been *res integra*, I should have thought were unanswerable—were brought

(1) 3 H. & C. 615.

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before the Court of Exchequer very fully and very ably; and it is clear that they were carefully considered by the Court.

Again, I might feel myself more free if it appeared that to follow the decision of the *Attorney-General* v. *Gell* (1) in this case would be to give to the principle that the Court of Exchequer then laid down an application which they never contemplated. But it seems to me that this particular application, or an *à fortiori* one, was contemplated, and that they were willing not to disavow it.

It was indeed argued that the present case was distinguishable from *Attorney-General* v. *Gell;* but I must not be astute in seeking distinctions which do not arise from real differences. There seems to me to be no real difference between this case and that of *Attorney-General* v. *Gell,* as the Court of Exchequer treated it; and certainly no such distinction between the cases as would have made that decision right if to decide in favour of the Crown in this case would be wrong.

Upon the authority of that case, therefore, and upon that authority only, I decide in favour of the Crown.

Solicitors for the Petitioners: Messrs. *Senior, Attree & Johnson.*

Solicitors for the Crown: *The Solicitor for the Inland Revenue.*

Solicitors for the other Respondents: Mr. *F. L. Soames;* Messrs. *Briggs & Son;* Messrs. *Prior, Bigg, Church & Adams.*

(1) 3 H. & C. 615.

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[1870 H. 190.]

HALL *v.* HALL.

[1871 H. 20.]

V.-C. W.

1872

May 28, 29; *June* 4.

Real Estate—Voluntary Settlement—No Power of Revocation—Professional Advice—Subsequent Acts of Settlor—Settlement relieved against.

A voluntary settlement should contain a power of revocation; if it does not, the parties who rely upon it must prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the Court sees, from the surrounding circumstances, that the settlor believed the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settlor, interfere and give relief against it.

Revd by LC 4 DJ 482 Ch 430

THE Plaintiff in the first of these suits was *Lewis Hall*, one of the two trustees of a voluntary settlement of real estate, and the second son of the settlor and testatrix in the suits. The Defendants were, *Ellis Hall* and some of the other children of the settlor; *Matthew William Thompson*, a purchaser of a portion of the settled property; and others.

The Plaintiffs in the second suit were the three infant children of *Ellis Hall*, by *Joseph Hobson*, their next friend; and the Defendants were *Lewis Hall* and others, and the trustees of the testatrix's will.

The facts common to the two suits were the following:—

In 1852 *Eliza Hall*, widow, was seised in fee, free from incumbrances, of certain hereditaments and premises in *Yorkshire*. She then had seven children, viz., *John Hall*, *Lewis Hall*, *Edwin Hall*, *Ruth Hall* the elder, *Sophia Hall* (now *Sophia Green*), *Jesse Hall* (since deceased), and *Ellis Hall*. She was desirous of making some provision for them. She had at that time a great dislike to making a will, and she accordingly instructed Mr. *George Humble*, a solicitor, of *Bradford*, to settle the property on herself and her children; the rents to be reserved to herself for life, then to be divided amongst her children until they were all of age, when the

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property was to be sold and the money divided equally; and the trustees of the settlement were to have power to sell the property at any time with her consent.

By the settlement, dated the 24th of December, 1852, expressed to be made between *Eliza Hall* of the one part, and *Lewis Hall* and *George Alderson* of the other part, and executed by *Eliza Hall*, after reciting that *Eliza Hall* was desirous of settling and assuring the hereditaments and premises thereinafter described, and intended to be thereby conveyed in the manner thereinafter mentioned, it was witnessed that, for effectuating such desire, and for the nominal consideration therein mentioned, she (*Eliza Hall*) thereby granted and conveyed to *Lewis Hall* and *George Alderson*, and their heirs, the hereditaments and premises therein described and hereinbefore referred to, to hold the same to them, their heirs and assigns, upon trust to pay the rents and profits thereof to *Eliza Hall* for her life, for her sole and separate use (her receipts to be good discharges for the same); and from and after her decease to pay the same rents and profits to *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, or apply the same for or towards their maintenance and education during their respective minorities; and when the youngest should attain the age of twenty-one years (the said *Eliza Hall* being then dead), upon trust to sell and dispose of the said hereditaments and premises in manner therein mentioned; and then upon trust, after reimbursing themselves their costs and expenses out of the purchase-money, to pay and divide the residue or surplus thereof unto and amongst the said *John Hall*, *Lewis Hall*, *Edwin Hall*, *Ruth Hall* the elder, *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, their executors and administrators, in equal shares and proportions, as tenants in common.

The settlement then contained a proviso giving the children and their issue such benefit of survivorship as was therein mentioned; a covenant for further assurance on the part of *Eliza Hall*; the usual trustees' receipt and indemnity clauses; and a power for the appointment of new trustees; but no other powers.

A memorial of the settlement was duly registered at *Wakefield* on the 1st of January, 1853.

In October, 1861, the settlor, without the knowledge of the trustees of the settlement, or either of them, mortgaged a portion

of the settled property to a Mrs. *Matthews*, to secure the repayment of £200 and interest. The mortgage was duly registered. It contained, however, no reference to the settlement; and the equity of redemption was reserved to the mortgagor herself.

The settlor, by her will, dated the 27th of May, 1866, after directing that all her debts, funeral and testamentary expenses, should be paid out of her personal estate, devised the premises therein described as the *Market Tavern* [being part of the settled property], to *Ellis Hall* for his life; and after his decease she devised the same premises unto and equally amongst all and every the child and children of her son *Ellis Hall* who should be living at her decease, and to the issue of such of them as might be then dead leaving issue; such issue taking the share only which their respective parents would have been entitled to had such parents been then living. She devised certain other premises, therein described as the butcher's shop and slaughter-house [also part of the settled property] unto her son *Jesse Hall*, his heirs and assigns for ever, if he should return to *England* and claim the same within twenty-one years then next ensuing, but in case her son *Jesse Hall* should not return to *England* and claim those premises within the said term of twenty-one years, then she devised the butcher's shop and slaughter-house unto and equally between and amongst her two sons, *Edwin Hall* and *Ellis Hall*, and to their respective heirs and assigns for ever, as tenants in common and not as joint tenants. She devised certain other premises, therein described as the *Cricketers' Arms* [also part of the settled property], unto her son *Edwin Hall*, his heirs and assigns for ever, subject, nevertheless, to the payment of the said mortgage debt (which had been reduced to the sum of £130), and all interest to become payable for the same; and she devised the three other messuages therein described [also part of the settled property], with the appurtenances, and also all the residue of her real estate [the residue, in fact, of the settled property], unto *Edwin Hall* and *Ellis Hall*, upon trust, amongst other things, to pay an annuity of £20 16*s.* per annum to *Sophia Green* for her separate use for her life, and an annuity of £7 16*s.* per annum to *Ruth Hall* the elder for her life for her separate use; and, subject to and charged with the said annuities and mortgage debt, she devised the said real estate upon the

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trusts therein mentioned, but which are not material to be here stated; and appointed her sons *Edwin Hall* and *Ellis Hall* trustees and executors of her will.

The testatrix made a codicil to her will, by which she substituted *Samuel Lupton* as a trustee instead of *Edwin Hall.*

She died on the 30th of June, 1866, and her will and codicil were duly proved by the executors on the 18th of July, 1866.

Shortly after the death of the testatrix *Lewis Hall* made diligent inquiries and searches for, and endeavoured to obtain possession of the settlement, in order to execute the trusts of it, but was unable to do so, and was informed that it had been destroyed by the settlor.

On the death of the testatrix *Ellis Hall* entered into the possession of the property devised to him for his life; *Edwin Hall* entered into the possession of that devised to him in fee, subject to the mortgage debt; and *Edwin Hall* and *Ellis Hall* entered into the receipt of the rents and profits of that devised to them in fee, in the event of *Jesse Hall* not returning to *England* and claiming the same.

Ellis Hall and *Samuel Lupton* duly entered into the possession of the residuary real estate of the testatrix devised to them upon trust as aforesaid; and paid out of the rents and profits thereof the annuities of £20 16*s.* and £7 16*s.* to *Sophia Green* and *Ruth Hall* the elder respectively.

On the 1st of August, 1867, *Edwin Hall* and the mortgagee sold and conveyed a part of the settled and devised property, called the *Cricketers' Arms Inn,* to *Matthew William Thompson* for £600; but with notice of the settlement.

On the 16th of October, 1869, *Edwin Hall* executed a deed, which was duly registered under the 192nd section of the *Bankruptcy Act,* 1861.

There was some conflict of evidence as to the knowledge possessed by the settlor, when she executed the settlement, and the precise circumstances under which she destroyed it; but the facts stated in the pleadings were as follow:

After the execution of the settlement the settlor retained it in her own possession, with the exception of a short time, during which it was alleged that *Lewis Hall* had it in his custody.

She received the rents and profits of the property during the whole of her life; and continued in the sole management and disposal of the property, and acted in such management and disposal without any reference to or the concurrence of the trustees therein named, or either of them. She so acted under the impression and belief that the settlement was revocable by her at any time, at her sole will; and that she had not thereby in any manner fettered or derogated from her full right to dispose of the same as she should think fit. Neither of the trustees of the settlement ever acted in the trusts of it (otherwise than by instituting the first above-named suit). In October, 1859, *Eliza Hall*, who was then very ill and confined to bed, sent for Mr. *Humble*, and directed him to prepare her will. She then told him that she "had done away with that old deed," meaning the settlement. He did not then inform her that she was in any manner prevented from or incapable of revoking the settlement; and he accordingly prepared, and she executed, a will; which, however, was afterwards revoked. Some time in the years 1861, 1862, or 1863, the settlor, with whom *Ellis Hall* was then living, took the settlement out of the chest of drawers in which she used to keep the same, and handed it to *Ellis Hall*, at the same time directing him to burn it. He accordingly, in her presence and by her direction, put the settlement into the kitchen fire, and covered it over with coals, and she and he watched it while it was being burnt away. When it was consumed she said, "There is an end of that," or used words to that effect. She evidently believed at the time not only that she had full power to deal with the settlement in any manner she pleased, but that by destroying the same in manner aforesaid she had actually revoked it. She and *Ellis Hall* were respectively utterly unacquainted with law; and neither she nor he was aware that the burning of the parchment upon which the settlement was written was not in itself sufficient to work a revocation of the provisions of the deed.

She had not, when she gave instructions for the preparation of the settlement, or at any time afterwards (save as hereinafter mentioned) any legal advice whatever, other than that of Mr. *Humble*. He was not consulted by her as to the revocation of the settlement, and was not informed by her of the destruction of it. Under

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those circumstances he had no opportunity of advising her, and did not in fact advise her, that such destruction of the settlement as aforesaid did not operate as a revocation of it.

Not only did the settlement contain no express power of revocation by the settlor, but she was not aware that an express form was requisite to enable her to revoke it. It did not occur to Mr. *Humble* to suggest to her, and he did not in fact ever suggest to her, that the insertion of such a power in the settlement would be requisite or advisable; and he did not in any manner call her attention to the fact that such voluntary settlement, if executed as prepared, would be irrevocably binding on her; and did not take any means to discover whether she desired such settlement to be revocable or irrevocable.

The whole family knew of the destruction of the settlement by the settlor, and regarded it as a revocation.

Jesse Hall predeceased *Eliza Hall*. He died a bachelor, and intestate; and no letters of administration were taken out to her estate.

Lewis Hall charged by the bill in his suit that the trusts of the settlement were in full force, and ought to be carried into execution; save in so far as such trusts might have been superseded or defeated as to such of the premises comprised in the settlement as were affected thereby by the mortgage mentioned or referred to in the will; and that inasmuch as *Matthew William Thompson* had full notice of the settlement and of the claim of *Lewis Hall* thereunder before the completion of the contract for the sale of the hereditaments and premises sold to him, he was a trustee for *Lewis Hall*, and his *cestuis que trust* under the settlement of the hereditaments and premises sold to him; or of so much of the purchase-money of the hereditaments and premises as was not properly applied by him in discharge of the mortgage debt and interest mentioned or referred to in the will.

Lewis Hall therefore prayed (*inter alia*) by his bill for a declaration that the settlement was a valid one of the hereditaments and premises therein comprised; and that the trusts of it (subject only to the aforesaid mortgage) ought to be carried into execution; certain inquiries; accounts; the delivery up of the possession of the hereditaments and premises; a receiver; that, if necessary,

the trusts of the settlement might be executed by the Court; for costs; for proper orders for the purposes aforesaid; and for further relief.

The Plaintiffs in the second suit submitted that the settlement was not binding upon the settlor, and that the trusts thereof ought not to be carried into execution as against the devisees under the will; but that, on the contrary, the settlement ought to be set aside by the Court.

If, however, the Court should be of opinion that the settlement was binding and ought to be carried into effect, then those Plaintiffs charged that *Sophia Green* and *Ruth Hall*, the elder, ought to elect between the benefits given to them by the will and those to which they were, or claimed to be, entitled under the settlement; and that if they or either of them should elect to take against the will, then the annuities or annuity so given to them or her as aforesaid ought to be applied in or towards making good to the Plaintiffs the benefits given to them by the will, and of which they would be deprived by the operation of such election.

The bill in that suit therefore prayed a declaration that the settlement was not binding upon the settlor, or those claiming under her, and that the trusts of it ought not to be carried into execution as against the devisees under her will; that the settlement might be set aside; that her will might be established by the decree of the Court; that if the Court should be of opinion that the trusts of the settlement ought to be carried into effect, *Sophia Green* and *Ruth Hall* the elder respectively might be required to elect between the benefits given to them respectively by the will, and the benefits to which they respectively claimed to be entitled under the settlement; that if they or either of them should elect to take under the will, then the property to which they or she would have been entitled under the settlement might be dealt with as directed by the will; but if they or either of them should elect to take against the will then that the benefits given to them or her by the will might be applied in or towards making good to the Plaintiffs what they should have been deprived of by the operation of the settlement; that in such last-mentioned case an account might be taken of all sums of money already received on account of the annuities respectively by them or her so electing to take

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against the will; and that they or she might be directed to repay to the trustees what should appear to have been received by them respectively at the foot of such account; that the bill in that suit might be taken as a cross bill to that in the first suit, and that the Plaintiffs might have such further or other relief as the nature of the case might require.

Mr. *Greene*, Q.C., and Mr. *Morshead*, for the Plaintiff *Lewis Hall*, and his co-trustee of the settlement, stated the facts of the case, adduced evidence in support of the settlement, and combated the objections made to the admission of it.

Mr. *Miller*, Q.C., and Mr. *Vaughan Hawkins*, for *Jesse Hall* the younger, *Frederick Hall*, and *Ruth Hall* the younger, reserved their principal arguments for delivery in the cross suit.

Mr. *Lindley*, Q.C., and *F. A. Lewin*, for *Matthew William Thompson*, argued that he was improperly made a Defendant in this suit. That the bill was informal as against him, and must be dismissed with costs.

They cited *Gordon* v. *Horsfall* (1); *Doe* v. *Lewis* (2); *Troughton* v. *Binkes* (3); *Martinez* v. *Cooper* (4).

Mr. *Stallard*, for *Ellis Hall*.

Mr. *Greene*, in reply.

Mr. *Miller*, Q.C., and Mr. *Vaughan Hawkins*, for the Plaintiffs in the second suit:—

First, as to the question whether the settlement ought or ought not to be set aside:

The evidence shews that the settlor did not think when she executed it that she was executing an irrevocable instrument. All the parties seem to have considered that all deeds are revocable by destruction. Here the settlor clearly imagined she could do away with this deed whenever she chose; and that in 1859, when she made a first will inconsistent with it, and when she had the settle-

(1) 11 Jur. 569.
(2) 11 C. B. 1035.
(3) 6 Ves. 573.
(4) 2 Russ. 198.

ment in her possession, undestroyed, she said "I have done away with it," she must have supposed that some different disposition of her property would vacate the deed. Then, again, the family knew of the destruction of it, and treated it as a revocation. Yet they now come, or, at all events, their trustees come, to set up that settlement which they all, being *sui juris*, deliberately treated as revoked. There is in this case something more than laches; there is positive acquiescence, and they cannot be allowed so to proceed.

Second: Then as to the law:

The principles derived from the cases are these:—

There are two kinds of voluntary settlements — where the object is to protect the settlor against some weakness of his own; where the settlement is a mere matter of bounty on the part of the settlor, or a *quasi* testamentary disposition by him. Where the primary motive is the protection of the settlor the settlement should be "irrevocable." But where bounty alone is his object, or it is *quasi* testamentary, the cases shew, not that a power of revocation is or is not essential to the validity of the settlement, but that the settlor must be proved to have known distinctly what he was doing when he executed the instrument, and what he wished to effect by it. It must be shewn, if such a power is not inserted in the deed, that the settlor intended to exclude it, and was fully aware of the effect which its exclusion would produce. In the case of *Phillips* v. *Mullings* (1) Lord *Hatherley* said: "Where a person is induced to execute such a deed, it must, in order to support the deed, be shewn that the nature of the deed was thoroughly understood by the person executing it. But the cases have not gone further. Some cases, however, have attempted to lay down what ought to be in such an instrument. It has, for instance, been almost laid down in *Coutts* v. *Acworth* (2) that where there is no power of revocation the deed will be set aside; and *Wollaston* v. *Tribe* (3) and *Everett* v. *Everett* (4) have been relied on as favouring the same view. But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable, unless it contained a power of revocation." Now in the

(1) Law Rep. 7 Ch. 244, 247.
(2) Ibid. 8 Eq. 558.
(3) Law Rep. 9 Eq. 44.
(4) Ibid. 10 Eq. 405.

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present case the real ground of the cross bill is, that there was "mistake" on the part of the settlor and her solicitor, who prepared the settlement. We do not allege any fraud. Our case is, that those who rely on the settlement must shew that the settlor was well advised as to it, and thoroughly acquainted with all its bearings, when she executed it. The evidence here shews that that was not the fact: *Naldred* v. *Gilham* (1) and *Cecil* v. *Butcher* (2). *Nanney* v. *Williams* (3), *Phillips* v. *Mullings* (4), *Wollaston* v. *Tribe* (5), and *Everett* v. *Everett* (6) really seem to carry the argument to this extent: that if a power of revocation is not inserted in the deed it lies on those who support the deed to shew that the settlor positively declined to have it put in. *Primâ facie*, therefore, every solicitor preparing such an instrument is bound to ask the settlor whether he means it to be revocable or the reverse; and if the solicitor does not ask that question the deed, if made irrevocable when the reverse was intended, is, *ipso facto*, void: *Mountford* v. *Keene* (7). That case was, no doubt, prior to *Phillips* v. *Mullings*, but it is not touched by it. *Forshaw* v. *Welsby* (8) shews, so far as the case does go, that there is no distinction on this subject between voluntary settlements of real and personal estate.

Again, this settlement was plainly substitutional for a will, and, as such, necessarily intended to be irrevocable: *Toker* v. *Toker* (9). Every case in this Court has gone more and more against these kind of settlements. For example, this Court will not "rectify" a voluntary settlement. Here, also, the form in which the equity of redemption in the subsequent mortgage was reserved shews that the testatrix did mean to keep the property under her control; and we say that in fact it was so throughout: *Anderson* v. *Elsworthy* (10). The case of *Mountford* v. *Keene* is identical with the present case, and is not overruled by *Phillips* v. *Mullings*. They are now the general law on this question, which is not whether a man shall or shall not give away his own property in his

(1) 1 P. Wms. 577.
(2) 2 Jac. & W. 565, 575–578.
(3) 22 Beav. 452–461.
(4) Law Rep. 7 Ch. 244, 247.
(5) Ibid. 9 Eq. 44.
(6) Ibid. 10 Eq. 405.
(7) 19 W. R. 708; 3 Davidson's Precedents, "Settlements," 823, n.
(8) 30 Beav. 243.
(9) 31 Ibid. 629; 3 D. J. & S. 487.
(10) 7 Jur. (N. S.) 1047.

lifetime, but whether he shall or shall not put it quite out of his power for ever. If he means the latter, he must be shewn to have all the requisite advice and knowledge of his acts, and proof of that lies on those who support the validity of his acts.

Thirdly: As to the question of election.

Assuming the Court to be against us on the other part of the case, it is plain that the two Defendants must (according to the well known rules of the Court) make their choice of the benefits conferred on them. The Plaintiffs in the cross bill being infants, were not called upon to answer, and did not answer, the bill in the first suit. As it was essential for us, in order to get a decree to set aside the settlement, to shew a case of either fraud, surprise, or mistake (we rely on the last), it was practically impossible for us to raise that case otherwise than by the cross bill.

On the whole case, therefore, we say this settlor had not proper advice when she executed this settlement. She was not made to understand its irrevocable character; nor was the difference between a revocable and an irrevocable instrument properly explained to her. All her own conduct points to the conclusion that she meant it to be revocable. There was a clear mistake on her part and on that of her solicitor; and, under all the circumstances of the case, this Court will not allow the deed to stand; it will set it aside and uphold the will.

Mr. *Greene*, Q.C., and Mr. *Morshead*, for *Lewis Hall*, *Ruth Hall* the elder, and *Sophia Green* and her husband, the principal Defendants in the second suit:—

These cases must, after all, be determined on their own facts. There is no decided case exactly like the present. It is a fallacy to say that the settlor wished this deed to be revocable. The evidence shews she had a morbid horror of making wills; and though she did make more than one, at the time when she executed this settlement she fully believed that she had finally provided for the children who were to benefit by it. The instructions given by her to Mr. *Humble* shew that she had a life interest under the settlement; and unless there is some inconsistency or contradiction (which we say there is not) between the settlement as prepared and executed by her and the instructions given for it, we must take

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it that the deed does express her real wishes. We say, therefore, that there is nothing to shew any desire on her part to retain a power of revoking the settlement. Indeed, the evidence relied on by the other side is far too conflicting and uncertain to be accepted by the Court. What the family thought is of no consequence. What she herself did is of much. But we say that, looking at the evidence which we have adduced in support of the settlement, it is impossible for the Court to say it is not now a valid and subsisting deed, and one which must be upheld.

Then as to the cases cited: *Naldred* v. *Gilham* (1) was very different from this case. There there was distinct "fraud." So also in *Cecil* v. *Butcher* (2). In *Nanney* v. *Williams* (3) the intention of the settlor was plain, and admitted of very little question. *Wollaston* v. *Tribe* (4) and *Everett* v. *Everett* (5) were considered in that very case of *Phillips* v. *Mullings* (6), and it was there said that they had gone too far. Lord *Hatherley*, by his decision, has brought back the law to a very sensible condition.

The distinction taken between the different kinds of voluntary settlements has no application here, where the only object of the settlor was to make an equal provision for her seven children. At the utmost it could only be said that there was an intention to protect one child, or one set of children, against another. But how does that assist these infant Plaintiffs? Not at all.

Mountford v. *Keene* (7) is a strange authority for the other side to rely on, because it was the case of a purchaser for value without notice. *Toker* v. *Toker* (8) was also a peculiar case. Fraud existed in it, though it was afterwards explained away; and it is to be observed that there the settlement was ultimately upheld.

As to the question of election, we do not dispute that. We ask only for a decree according to the prayer of our bill in the first suit.

[They also cited *Sear* v. *Ashwell* (9); *Bolton* v. *Bolton* (10);

(1) 1 P. Wms. 577.
(2) 2 Jac. & W. 565, 575–578.
(3) 22 Beav. 452–461.
(4) Law Rep. 9 Eq. 44.
(5) Ibid. 10 Eq. 405.
(6) Ibid. 7 Ch. 244, 247.
(7) 19 W. R. 708; 3 Davidson's Precedents, "Settlements," 823, n.
(8) 31 Beav. 629; 3 D. J. & S. 487.
(9) 3 Sw. 411, n.
(10) Ibid. 414.

Worrall v. *Jacob* (1); *Fletcher* v. *Fletcher* (2); *Re Way's Trusts* (3); *Childers* v. *Childers* (4); *Jefferys* v. *Jefferys* (5).]

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Mr. *Stallard*, for *Ellis Hall*.

Mr. *Bagshawe*, for *Lupton*.

SIR JOHN WICKENS, V.C.:—

Mr. *Miller*, I do not think I need trouble you. I have come very unwillingly to a conclusion—but I have come to a conclusion—in your favour.

A voluntary settlement of real estate, though containing no power of revocation, is always to some extent in the settlor's power, since he can at any time sell or mortgage the settled property.

And there can hardly be any legal presumption that the person ordering and executing a deed, which, though voluntary, does not purport to be revocable, believes that he has a power of revoking it at his pleasure.

Hence it is not, I think, quite easy to recognise as sound the conclusion that the absence of a power of revocation from the voluntary settlement of real estate is, where a revocable settlement would answer the settlor's purpose as well as an irrevocable one, *primâ facie* evidence of mistake; and that that *primâ facie* evidence can only be rebutted by shewing that the settlor had his attention pointedly called to these facts—that his purpose could be effected by a revocable as well as by an irrevocable deed; and that if the deed contained no power of revocation, it would be irrevocable. But such seems to be the result of the recent authorities.

It is necessary that fraud, surprise, or mistake should be proved before a voluntary settlement can be set aside. And to set it aside a cross bill is necessary: as is clearly laid down in the case of *Re Way's Trusts*. The doctrine which seems to have been introduced since Sir *W. Grant* decided *Worrall* v. *Jacob* is, that although a cross bill is necessary, there is in such a case a sort of

(1) 3 Mer. 256.
(2) 4 Hare, 67.
(3) 2 D. J. & S. 365.
(4) 3 K. & J. 310.
(5) Cr. & Ph. 138.

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presumption of mistake, which to a great degree, if not entirely, changes the onus, and throws a very peculiar burthen on the persons who support the settlement. The reasoning on which that conclusion is founded is not perfectly satisfactory to my mind; but of course I am bound to follow the authorities. Most of them have been cited in the arguments, and need not be now particularly noticed. I should, however, observe that the judgment in *Mountford* v. *Keene* (1) is precisely in point, and is not, I think, inconsistent with anything that was stated in *Phillips* v. *Mullings* (2).

No doubt amongst the very numerous cases that were cited there are shades of difference, as there must be where very ill-defined rules are applied to various instruments and under various circumstances. But the fair deduction from the cases altogether, especially from the more recent ones, seems to me to be such as I have stated.

It was argued in this case that when Mrs. *Hall* executed the deed she knew that she was doing, by an irrevocable act, what she might as well have done by a revocable one. But—weighing as well as I can the evidence in this case, and giving no more than a fair weight, but giving a certain amount of weight, to the inference from her subsequent conduct and expressions as to her intentions at the time when she executed the deed—I cannot accede to that view. I doubt, in fact, if on the evidence, I could even come to a conclusion that she knew the deed to be irrevocable when she executed it.

Therefore, without adverting to the very numerous points which have been argued—some of them points of very great importance and of great difficulty—I think I must hold this settlement to be invalid.

The result is, that the original bill will be dismissed with costs against Mr. *Thompson*; but without costs against everybody else; and a decree will be made in the cross suit setting aside the settlement, but also without costs. Mr. *Lupton* may have his costs out of his own estate. No other decree will be made on the cross bill. It seeks to establish the will; but the evidence neces-

(1) 19 W. R. 708; 3 Davidson's Precedents, "Settlements," 823, n. W.N.(1871) 6

(2) Law Rep. 7 Ch. 244, 247.

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sary for that purpose has not been given, and probably it will not be pressed.

Solicitor for the Plaintiffs in first suit: Mr. *M. K. Braund*, agent for Mr. *James Green, Bradford, Yorkshire.*

Solicitors for the Plaintiffs in cross suit and *Ellis Hall:* Messrs. *Duncan & Murton*, agents for Mr. *George Humble, Bradford, Yorkshire.*

Solicitors for *M. W. Thompson:* Messrs. *Paterson, Snow, & Burney*, agents for Messrs. *Busfeild & Atkinson, Bradford, Yorkshire.*

FERGUSON *v.* GIBSON.

V.-C. W.
1872
June 11;
July 1.

[1867 F. 34.]

Administration Suit—Proceeds of Testator's Estate in Court—Specialty and Simple Contract Creditors—Devisees and Executrixes—Right of Retainer.

A testator died leaving a deficient estate, his wife and daughter being executrixes.

The wife having real estate settled on her for life, with a general power of appointment, had appointed it as collateral security for a mortgage debt of the testator. This debt had not been paid at the date of the decree:—

Held, that the right of the widow as surety to be indemnified created a simple contract debt only, and did not entitle her to retain as against specialty creditors.

The daughter was absolutely entitled under a settlement, subject to the testator's life interest, to funds out of which the trustees had power to advance £2000 to the testator on his bond, which they did. They afterwards made large further advances to him on promissory notes:—

Held, that the daughter had a right to retain as against specialty creditors the £2000 and interest from testator's death, but not the subsequent advances.

The rule laid down in *Henderson* v. *Dodds* (1) in regard to costs, followed.

19 Eq 24
1 Ch D 174
24 Ch D 654
654, 657

FURTHER CONSIDERATION.

This was a suit by a simple contract creditor, on behalf of himself and all other the creditors of *Robert Gibson*, for the administration of his estate. *Robert Gibson* died on the 10th of January, 1867; and he, by his will dated in July, 1865, after making a

(1) Law Rep. 2 Eq. 532.

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specific bequest to his wife (by his second marriage), the Defendant *E. H. Gibson*, directed payment to be made out of his estate of such a sum of money as should be equal in amount to the aggregate sums of principal money which he should have obtained from time to time during the continuance of their coverture on the security of the estate of his said wife's father, Sir *Benjamin Smith*, deceased, under the exercise by her of the power of appointment reserved to her, and which should remain unpaid by her at her decease, so as to exonerate the estate of Sir *Benjamin Smith*, deceased, from the payment of such sum; and the testator devised and bequeathed all the real estate, and all the residue of the personal estate which at his decease he should have power to devise or bequeath, unto his wife and his daughter, the Defendant *M. I. Gibson* (the only issue of his first marriage), as tenants in common in equal shares during the life of his wife; and from and after her decease he gave the same unto his daughter *M. I. Gibson*, her heirs, executors, and administrators, absolutely; and he appointed his wife and daughter executrixes.

In May, 1867, the usual decree was made, and, *inter alia*, it was ordered that the real estate of the testator should, if necessary, be sold, and the proceeds of sale paid into Court.

Under a settlement directed to be made by the will of *M. I. Gibson's* maternal grandfather trust funds to the amount of £11,000 were settled in effect upon trust for *Robert Gibson* for life, and after his decease for *M. I. Gibson* absolutely. The trustees were empowered to advance £2000, part of such trust funds, unto *Robert Gibson* upon the security of his bond; and in 1851 an advance of that sum was made by the trustees to *Robert Gibson*, who duly executed a bond for the repayment thereof.

Under the will of the father of *E. H. Gibson* real and personal estate of considerable value was in effect settled upon trust for her for life for her separate use, and without power of anticipation, with remainder to *Robert Gibson* for life, with remainder for such persons or purposes as she should by deed or will appoint. *Robert Gibson* in his lifetime borrowed large sums from the *Pelican Life Assurance Company*, and as security for the same he mortgaged certain real estates to which he was entitled to trustees for the company, and as additional security for the same he induced his wife to mortgage to the said trustees the real and personal estate derived under the

will of her father, by the exercise of her power of appointment affecting the reversion in remainder in such estate after the decease of herself and *Robert Gibson*. The whole of the moneys received from such trustees were paid to *Robert Gibson*, and applied by him to his own use.

There was a power of sale in the deed, and a proviso for redemption on payment of the debt under the covenant by *Robert Gibson*. The deed contained no covenant by Mrs. *Gibson*. It was taken, on the evidence, that at the time she became her husband's surety the value of her property comprised in the deed was greater than the amount of his debt.

The Chief Clerk certified that the Defendants, in addition to realising personal estate amounting to £8520 8*s.* 8*d.*, and paying £9181 8*s.* 8*d.*, leaving a balance due to to them of £661, had paid nearly £2000 personal estate into Court to the credit of the cause; that the personal estate was largely insufficient for the payment of the testator's debts, which amounted to £14,297 19*s.* specialty, £23,687 13*s.* 5*d.* simple contract, and £479 9*s.* 6*d.* a debt of record; that the greater portion of the real estate had been sold under the decree, and the proceeds, with some interest, had been (except as to a sum of £717 2*s.* 5*d.* paid in by the Defendants) paid into Court by the purchasers to the credit of the cause and invested; and that there was standing to accounts intituled "Proceeds of Sale of Real Estate," £8837 15*s.* 10*d.*, £3 per Cent. Annuities, and £520 cash.

The Chief Clerk also certified that a Mrs. *Jane Harrington* was, under a covenant in a deed executed by *Robert Gibson* in June, 1846, a specialty creditor for the sum of £442; that the representative of the surviving trustee (now deceased) of the above-mentioned settlement was a specialty creditor for (including the £2000) £4026 (the £4026 having been lent on the security of promissory notes), and a simple contract creditor for £14,222 7*s.* 5*d.*, as trustee for *M. I. Gibson* in respect of the trust funds advanced to the testator; and he also certified that the trustees of the *Pelican Life Assurance Company* were specialty creditors under the mortgage deeds for about £10,000.

The daughter, by her joint answer, claimed to be entitled to receive the whole of the trust funds from the estate of *Robert*

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Gibson, and insisted upon the exercise of her right of retainer as executrix, so far as such right would extend against his estate, for the purpose of recovering or obtaining payment, or part payment, of the trust funds. And the widow, by her joint answer, claimed that the property derived under the will of her father might be exonerated, by or out of the estate of *Robert Gibson*, from the payment or discharge of the mortgage debts and liabilities, and for that purpose, or otherwise, she insisted upon the exercise of her right of retainer as executrix.

Mr. *Jolliffe*, for the Plaintiff, after stating the facts, claimed to be paid the costs of the suit in priority to the right (if any) of retainer.

Mr. *Lindley*, Q.C. (Mr. *Dixon* with him), for the Defendant, the widow:—

The will contains no charge of debts. The questions are as to rights of priority, both as regards costs and debts. The widow, as surety for her husband to the *Pelican Life Office*, has a right to have her estate exonerated out of the fund in Court, though she has not paid the debt: *Nisbet* v. *Smith* (1). It is not contested that the widow is devisee of real estate and executrix under the will. A devisee has a right of retainer out of the proceeds as regards specialty debts: *Loomes* v. *Stotherd* (2).

The widow has the same right of retainer as against the whole fund—all legal assets; but certainly as against the personal estate for the debt, and she is also entitled to have her costs as between solicitor and client in priority. Her right of retainer she has not lost by the circumstance of the proceeds of sale of the estate having been paid into Court. A surety is entitled to have a debt discharged before he has actually put his hands into his pocket, and therefore the widow has a right to have the debt due to the life office discharged: *Bathurst* v. *De la Zouch* (3), which was followed in *Boyd* v. *Brooks* (4).

If the proceeds of sale were not in Court, they would be under the control of the widow, and she would be entitled to impound as

(1) 2 Bro. C. C. 578.
(2) 1 S. & S. 458.
(3) 2 Dick. 460.
(4) 34 Beav. 7.

much as might be necessary to relieve her from all liability. Her right of retainer has not been displaced by the payment into Court. The widow's right is clear at law, not only as a simple contract creditor, but as a specialty creditor: *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97, s. 5).

[He also cited *Tipping* v. *Power* (1); *Chissum* v. *Dewes* (2); *Copis* v. *Middleton* (3); *Williams* on Executors (4).

Mr. *C. Hall*, for the Defendant, the daughter, submitted that it was clear that she had a right of retainer, both as specialty creditor and as executrix, for the £4000 odd advanced by the trustee, whom the Chief Clerk had certified to be a specialty creditor. Her claim as a specialty creditor could not be questioned. She was entitled to be paid, either in priority to or rateably with the widow, out of the personal estate in the first instance, and if that should be insufficient, then out of the proceeds of sale of the real estate.

He referred to the cases cited in *Williams* on Executors (5), and to *Bain* v. *Sadler* (6), and *Hall* v. *Macdonald* (7); and as to costs to *Henderson* v. *Dodds* (8).

Mr. *Dickinson*, Q.C., and Mr. *C. T. Mitchell*, for Mrs. *Harrington*, who had obtained leave to attend the proceedings:—

There is no question as to Mrs. *Harrington* being a specialty creditor, but there will be as to payment if the right of retainer be allowed, for in that case nothing will be left for the other creditors. The widow's claim will scarcely bear examination. The debt is due to the trustees of the *Pelican Life Office*. The widow is a surety for, but she has not paid the debt, and she claims the right of retainer because her property may be attached by the trustees of the office. That is the utmost extent that the claim comes to. Even if she had a right to file a bill to have her estate indemnified she cannot be entitled to stand before the other creditors. It is not alleged that the widow is under any personal liability, and it is submitted that she is entitled to nothing more

(1) 1 Hare, 405.
(2) 5 Russ. 29.
(3) T. & R. 224.
(4) 6th Ed. vol. ii. pp. 947 and 979.
(5) 6th Ed. vol. ii. p. 973.
(6) Law Rep. 12 Eq. 570.
(7) 14 Sim. 1.
(8) Law Rep. 2 Eq. 532.

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than an indemnity; but out of what estate can it come? If the widow had paid the debt she might perhaps stand in the trustees' places under the *Mercantile Law Amendment Act* of 1856, but at present she has no right to be preferred. That right is gone. She is not entitled to ask for payment at all. She did not come in to prove a debt, but she now asks that her estate may be exonerated out of the estate of the testator. The Chief Clerk has certified that there is a subsisting debt, but he makes no mention of her right to retain anything. It is submitted, therefore, that the claim of the widow ought not to be allowed, but that the assets of the testator ought to be applied in priority, so far as they will extend, in discharge of the other specialty debts. The claim of the daughter is in a different position, but her right to retain as against specialty creditors cannot extend beyond the £2000 lent on bond and the interest which has accrued since the testator's death.

Even if these assets—the proceeds of real estate—had come into the hands of the executrixes, they could not, it is submitted, have had any lien upon them, but in this case the assets were paid into Court by the purchasers.

The Defendants' answers moreover preclude them from claiming the right of retainer now contended for: *Player* v. *Foxhall* (1).

[They cited *Loomes* v. *Stotherd* (2); *Williams* on Executors (3); *Roskelley* v. *Godolphin* (4); *Thompson* v. *Thompson* (5); *Loane* v. *Casey* (6); *Franks* v. *Cooper* (7); *Hudson* v. *Carmichael* (8); *Pitman* on Principal and Surety (9).]

Mr. *Herbert Smith*, for simple contract creditors.

Mr. *Lindley* referred to *Burn* v. *Burn* (10).

SIR JOHN WICKENS, V.C.:—

In this case all the assets are legal, or at any rate for the purpose of my decision I may treat the assets as being entirely legal.

(1) 1 Russ. 538.
(2) 1 S. & S. 458.
(3) 6th Ed. vol. ii. p. 974.
(4) Sir T. Raym. 483.
(5) 9 Price, 464.
(6) 2 W. Bl. 965.
(7) 4 Ves. 763.
(8) Kay, 613.
(9) Page 143, *et seq.*
(10) 3 Ves. 573, 575, 579.

They consist of some personal estate and the proceeds of real estate, all represented by money in Court. Therefore, except as regards the question of costs, I do not see that there is any necessity for making a distinction in what I have to say between real and personal estate.

As I have during the argument intimated, *Player* v. *Foxhall* (1) does not, I think, compel me to hold that the Defendants have waived their right of retainer by the form of their answer.

In *Player* v. *Foxhall* there was an actual submission to apply the real estate in payment of debts, meaning *primâ facie* specialty debts, generally and equally. That case stands on a very different footing from this, in which, putting it at the highest, it is only that one of two claims is made by the answer without mention of the other.

It seems to me, notwithstanding the arguments addressed to me, that the daughter's right to retain, so far as respects the £2000, and interest upon it since the testator's death, is clear. There is, so far as I can judge, no doubt that her right to the real estate, though less than an absolute interest in possession, is represented by a part of the sum in Court arising from real estate which must be much more than equivalent to the debt in question.

On the other hand, the arguments have failed to convince me that the form of the certificate binds me to carry the daughter's claim further than as I have mentioned; or that the subsequent illegal advance of the trust funds by the trustee, which seems to have been an advance on promissory notes bearing interest at 4 per cent., affects for this purpose the question as to the bond debt.

With regard to the widow, her case is very distinguishable. Although it does not appear in whom the beneficial interest subject to the power was, yet I take it, that—as she is stated to have been entitled for her life with a power to appoint by deed or will — a mortgage created by the exercise of that power stands for all purposes on the footing of a mortgage of separate estate. Therefore the case is within *Hudson* v. *Carmichael* (2), and the widow is so far in the position of a surety that the estate

(1) 1 Russ. 538. (2) Kay, 613.

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which she appointed may be considered as an estate mortgaged by a surety; and, as the estate is worth much more than the sum due, she may be treated as a surety to all intents and purposes.

Now a surety has a right in equity to file a bill for the purpose of being indemnified against a debt before he has paid anything himself, and this right creates an equitable debt, but not I take it a specialty debt. The widow, therefore, in respect of it is a creditor of the estate; but merely a simple contract creditor. It is true that in general, by force of the *Mercantile Law Amendment Act*, s. 5, a surety paying off a specialty debt becomes a specialty creditor of the principal debtor; and it may be that if the widow had paid it, or it had been raised out of her estate by a mortgage, she might have acquired a right of retainer as against the specialty creditors. That was not done, and the widow's only right now is to have it paid out of the proper fund, viz., the principal debtor's assets. It is true that she might before suit have paid this debt out of the testator's assets in preference to any other specialty debt, but this right she lost by the decree.

In the result, therefore, she is a simple contract creditor only, although the testator's debt to the trustees of the *Pelican Life Assurance Company* is a specialty debt. It follows that the widow's debt—that is to say the two sums making one debt, in which the the widow is interested—must be treated, in distributing the assets, as a simple contract debt. As to the costs, I propose to deal with them according to the case of *Henderson* v. *Dodds* (1), which lays down a very just and very simple rule.

Solicitors for the Plaintiff: Messrs. *Rhodes, Son, & Duffet.*
Solicitors for the Defendants: Messrs. *J. & M. Pontifex.*
Solicitors for a Specialty Creditor: Messrs. *Finney & Son.*
Solicitor for a Simple Contract Creditor: Mr. *Gedye.*

(1) Law Rep. 2 Eq. 532.

In re METROPOLITAN PUBLIC CARRIAGE AND REPOSITORY COMPANY.

V.-C. W.
1872
July, 7, 8.

CLELAND'S CASE.

Companies Act, 1862, *ss.* 16, 23, 38, 74—*Companies Act*, 1867, *s.* 25—*Allottee of "fully paid-up" Shares, Liability of.*

A holder of shares allotted to him as "fully paid-up," will, on the winding-up of the company, now be placed on the list of contributories to it, unless he can shew that the shares were paid for "in cash," or that the 25th section of the *Companies Act*, 1867, was otherwise complied with.

The cancellation of a debt due from the company for service is not payment in cash within the meaning of the section.

Whether payment in cash by *A.* for the allotment of fully paid-up shares to *B.*, or whether the cancellation of a debt due to the allottee for money lent would be payment in cash within the section, *quære.*

8 Ch 256 n (b)
251, 273,
8 Ch 444
17 Eq 174
18 Eq 98 n.
162,
16 L.T. 122

ADJOURNED SUMMONS.

The *Metropolitan Public Carriage and Repository Company, Limited*, was being wound up by the Court. Mr. *Cleland's* name was on the share register as the holder of 200 fully paid-up shares in the company. The official liquidators took out a summons for an order to settle the list of contributories, on which they had placed the name of Mr. *Cleland* in respect of the 200 shares. The summons was adjourned into Court at his request.

The company was incorporated under the Companies Acts, 1862 and 1867, on the 11th of March, 1870, with a nominal capital of £150,000, divided into 100,000 shares of £1 each, and £50,000 in debentures, bearing interest at 7½ per cent. per annum.

By the articles of association of the company (clause 9), the directors were empowered to issue and allot fully paid-up shares to such an amount as they should in their discretion think fit, in payment or part payment of the consideration for any property which might be purchased by the company.

By an agreement dated the 7th of June, 1870, and made between the company of the one part, and Mr. *Alexander Hamilton Gunn* of the other part, the company appointed him their sole agent for the negotiation for and purchase of business and premises for the

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company, upon the terms and subject to the conditions mentioned and contained in the agreement.

On the 22nd of June, 1870, the directors of the company proceeded to an allotment of shares. 5161 shares only were applied for, and allotted to the public; in respect of which shares £984 10*s.* and no more, were paid, and treated as paid.

The company, through the agency of Mr. *Gunn*, entered into a provisional agreement for the purchase of certain premises, called the *Star Yard* property; and on the 13th of July, 1870, paid a deposit of £100 on account of the purchase-money, but they never took possession of the property, or paid any more money for it. In fact, the company never was completely floated, and never transacted any business. They paid Mr. *Gunn*, however, for the commission due to him in respect of their provisional agreement to purchase the *Star Yard* property various sums of cash amounting in all to £48 11*s.*

On the 31st of August, 1870, a board meeting was held, at which the directors passed a resolution, "That in the event of Mr. *Gunn* applying for fully paid-up shares in part payment of the commission due to him as the purchaser of the *Star Yard* property, the same should be allotted to him by the managing director in conjunction with any other director."

Neither the agreement of the 7th of June, 1870, nor the resolution of the 31st of August, 1870, was registered as prescribed by the *Companies Act*, 1867, s. 25.

The company was unable to pay Mr. *Gunn* the whole of his claims for commission in cash, and they offered him, and he consented to take, fully paid-up shares in part satisfaction of his demand. The company accordingly allotted to him, or his nominees, 650 shares, and debited themselves with the sum of £650 paid. Those shares included the 200 allotted to Mr. *Cleland*.

The circumstances under which Mr. *Cleland's* name was placed on the list of shareholders in the company were these: he never himself signed the memorandum of association, or any application for shares in the company; nor did he ever have notice of an allotment of any shares to him. But in the month of August, 1870, he called at the offices of the company, where he saw Mr. *Gunn* in the presence of Mr. *Javal*, the managing director. Mr.

Gunn informed him that the company were indebted to him (Mr. *Gunn*) in various sums of money, which he was desirous of reducing or discharging by taking fully paid-up shares in the company instead of cash. Mr. *Javal* then said that he was authorized by the directors to issue such fully paid-up shares to Mr. *Gunn*, and Mr. *Gunn* told Mr. *Cleland* that he did not wish to have the shares standing in his own name, and asked him if he would consent to have them placed in his name for him, as being fully paid-up shares. Mr. *Gunn* said there was no liability or risk attached thereto by Mr. *Cleland's* so doing. Mr. *Cleland* thereupon consented to the shares being placed in his name, relying on the statement of Mr. *Gunn* that the shares were to be issued to him by the company instead of cash due to him from them (which was confirmed by Mr. *Javal*, the managing director), and also relying on Mr. *Javal's* assurance that he had the authority of the directors for issuing such shares. Mr. *Cleland* at the same time, at the request of Mr. *Gunn*, signed a blank transfer of the 200 shares.

Mr. *H. M. Jackson*, for the official liquidators:—

The question raised by this summons is quite a new one, and has never yet been judicially dealt with.

The *Companies Act*, 1862, s. 16, provides that when the articles of association of a company are registered they shall bind the company, and the members thereof, to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of that Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be of the nature of a specialty debt.

The 23rd section provides that the subscribers of the memorandum of association of any company under that Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of mem-

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bers thereinafter mentioned; and every other person who has agreed to become a member of a company under that Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

The 38th section provides that, in the event of a company formed under that Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with (*inter alia*) the qualification following (that is to say): "(4). In the case of a company limited by shares no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member."

The 74th section thus defines a "contributory": "The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up. It shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory."

The *Companies Act*, 1867, s. 25, enacts that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

The question, therefore, under those sections, is practically this:—

Is Mr. *Cleland*, as the holder of shares represented as fully paid up, but for which, in fact, not a shilling of money was ever paid or any consideration given, liable to contribute, in cash, the full value of the shares? I say he is.

The 25th section of the Act of 1867 is as plain as language can be. The mischief against which the Legislature was then providing was this: members of a company were in the habit of

dealing with their shares *inter se* without actually paying for them. That was unjust to third parties—to creditors—because it did not afford to them the pecuniary guarantee which the Legislature intended that all companies should give to the public of their solvency. Therefore the 25th section was made law, fixing all holders of shares not really paid for with the liability to pay, and to pay for them "in cash." Here there was no such payment by Mr. *Cleland*. What the company may have owed to Mr. *Gunn* is immaterial. It may have been more than the shares which he took in part payment.

[The VICE-CHANCELLOR:—Suppose Mr. *Gunn* had paid one hundred sovereigns for these shares, and had them put into the name of Mr. *Cleland* as his trustee, would that payment have been good for nothing?]

That is not this case. The 25th section is explicit, and yet Mr. *Cleland*, in the absence of any such registered agreement as that section requires, insists that the shares are free from the liability to such payment.

[The VICE-CHANCELLOR:—Is not a set-off the same thing as a payment in cash?]

No. But even if it were, in this case the debt was due, not to Mr. *Cleland* but to Mr. *Gunn;* and Mr. *Cleland* chooses to think that the allotment of the shares made to reduce the debt due from the company to Mr. *Gunn* is equivalent to a payment in cash for the shares by Mr. *Cleland* himself. He was merely the nominee of Mr. *Gunn;* and being such, the Companies Acts will not permit him so to discharge himself of his liability. *Forbes and Judd's Case* (1) is identical with the present case. *Migotti's Case* (2) differed from both that and this. In *Forbes and Judd's Case* the company got, as has been said, "both meal and malt." Mr. *Cleland*, it is true, did not sign the memorandum of association; but by virtue of the above-stated sections of the *Companies Act*, 1862, he became to all intents and purposes a member of the company; and the 25th section of the Act of 1867 is imperative. If he is properly placed on the list of shareholders (a point not, I think, in

(1) Law Rep. 5 Ch. 270. (2) Law Rep. 4 Eq. 238.

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dispute between us), he is as properly a member of the company. But being a member and a shareholder he has made (as each shareholder does) a separate and distinct contract with the company to pay for his shares in money or money's worth. He has not paid in money and he cannot pay in money's worth, because he cannot set off the arrangement between the company and a third party; he cannot credit himself with a payment made to Mr. *Gunn* on account of the debt due to him, and must therefore pay for these shares in cash.

The 9th clause of the articles allows the issue of fully paid-up shares only in payment of property purchased by the company. Here no property was purchased by this company, which was entirely a bubble one. No consideration whatever was, in fact, given for these shares. The resolution of the 31st of August, 1870, does not assert, and there is nothing in the evidence to shew, that anything really is due to Mr. *Gunn*: *Crawley's Case* (1); *Addison's Case* (2); *Elkington's Case* (3); *Pellatt's Case* (4).

On the whole case I say:

First: Mr. *Cleland* is bound to pay the full amount of these shares in cash.

Secondly: If he is entitled to any benefit of any transaction between the company and Mr. *Gunn*, he must stand in Mr. *Gunn's* shoes.

Thirdly: The evidence does not shew that anything is really now due to Mr. *Gunn*.

Fourthly: Even assuming that he did do some work under the contract, the remuneration is not now due; and, therefore, Mr. *Cleland* ought to be placed on the list of contributories, and held liable for calls on his shares, to be paid in cash at the proper times.

Mr. *Lindley*, Q.C., for Mr. *Cleland*:—

I say that he ought not to be placed on the list of contributories, because,

First: He never agreed to be a holder of any shares in the company except shares "fully paid up," on which, of course, there

(1) Law Rep. 4 Ch. 322–326.
(2) Ibid. 5 Ch. 294.
(3) Law Rep. 2 Ch. 511.
(4) Ibid. 527.

would be no liability; or, in other words, if these shares are not fully paid-up shares there is no contract between him and the company.

Secondly: These shares have been paid for within the meaning of the Acts.

I will take the second branch of my case first:

This company has tried to discharge a portion of a debt due from it to a creditor by giving him fully paid-up shares on account of it. If the argument for the official liquidator here is correct, the result will be that the company will have a claim against their own creditor in respect of the very security which they have given him for their obligation to him. That is a most startling conclusion. It may be so, perhaps, but can scarcely be accepted as sound.

Well, then, the case stands thus: Mr. *Gunn* actually does claim something from the company in respect of his commission. The precise amount is not stated, nor is it material. £18 11s. have been paid to him on account. After that the directors authorize their officer to discharge the debt by allotting him (if he asks for them) fully paid-up shares on account of his claim. The claim is a perfectly *bonâ fide* one. Mr. *Gunn*, in effect, says to the company: "You owe me so much money—pay me." The company says: "We will. Will you take fully paid-up shares in payment of the money?" He replies, "I will." They then pay him with the shares, and at his request they are allotted to Mr. *Cleland*. Mr. *Cleland* is only a trustee of them for him; he is merely his nominee. But there is nothing in that transaction which is at all repugnant to the provisions of the Companies Acts. Neither Act says that a debt shall not be paid in fully paid-up or any other kind of shares, and it is impossible, I think, so to construe the 25th section of the Act of 1867.

Assuming the transaction between Mr. *Gunn* and the company to be perfectly *bonâ fide*, that section does not really apply to this case. This company was formed in March, 1870. The agreement with Mr. *Gunn* was in June, 1870. What the Acts meant to provide against and render difficult was the undue payment of promoters of companies. The Acts never contemplated interfering with such contracts as these. Here the debt was contracted by the company after its formation, and paid after it.

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The distinction between "payment" and "set-off" is clear. A set-off is allowable where there are two cross demands. The cases at law are numerous: *Callander* v. *Howard* (1). If the arguments on the other side are sound, no release, and, in fact, nothing short of a honoured cheque, or gold, can be a payment for shares in a company. Does the Act mean that if I am under an obligation to pay in cash, it is absolutely impossible for me to discharge my obligation in any other way?

[Mr. *Jackson*:—Not after liquidation.]

Liquidation has nothing whatever to do with the matter. The Acts apply to going concerns as well as bubble and insolvent ones. What the Act meant was, that shareholders should not represent to the public that they had paid money for their shares when they had not. But as between themselves, there is no sort of reason why a set-off cannot be just as good as an actual payment of money. It is just as if cheques had been passed for the amount. So much then for the 25th section; and I say that if the matter rested there, these shares have been "paid" for within the meaning of the Act. There has been no deceit practised on the public; who might at any time have seen the list of shareholders, and what shares were standing in Mr. *Cleland's* name.

Then to take my first proposition:—

Assuming these shares not to be fully paid-up shares—why is Mr. *Cleland* treated as a shareholder at all? He never agreed to take shares not fully paid up; and he is in no sense a member of the company, except as to fully paid-up shares. It is not open to the company to say the shares allotted by them to him are not fully paid-up shares, or are other than what they represented them to be, on allotment. That point is not touched by the Act of 1867 at all. If, therefore, Mr. *Cleland* is not a holder of free shares—shares fully paid up—he holds none. But the Act only speaks of a person assumed to be a shareholder in the company: *Bunn's Case* (2); *Pellatt's Case* (3); *Stace and Worth's Case* (4). The distinction between *Forbes and Judd's Case* (5) and the present one is so

(1) 10 C. B. 290–302.
(2) 2 D. F. & J. 275–295.
(3) Law Rep. 2 Ch. 527.
(4) Ibid. 4 Ch. 682.
(5) Law Rep. 5 Ch. 270.

clear that it is hardly necessary to point it out. When a man signs the memorandum of association (which Mr. *Cleland* has not done) he agrees to accept the shares set opposite to his name. In *Forbes and Judd's Case* (1) the party paid "neither in meal nor malt."

In *Crawley's Case* (2) and *Addison's Case* (3), there were agreements to take the shares. *Addison* had paid money for them; but he received the money back again, in respect of other shares which he had had.

To revert for a moment to the 25th section. The intention of the Legislature perhaps was, in checking promoters' agreements, to put an end to future sets-off as to them. But if all that is found in the case is the passing, or what amounts to a passing, of cheques between the parties in respect of the shares, it is impossible to say they have not, *de facto*, been paid for in cash.

But again: does the 25th section apply at all, except where shares are issued to the public? Issued to them in the first instance. What does the word "issue" in the section mean? It may mean, "You shall not have fully paid-up shares, *i.e.*, the benefit of them, without a contract preceding the issue of them." Or it may apply to any shares, or to the issue of any. The real object of the section seems to have been to protect persons taking shares in companies just formed; and there does not appear to have been any intention of applying the regulation either to companies which have issued nearly all their shares, or to companies reserving a few shares for issue in a manner different from the original issues. An "issue" of shares is, I suppose, an "allotment" of them. But be that as it may, this case must be determined, eventually, with reference to the two propositions which I have submitted to the Court and discussed, viz., 1. That these shares are, practically, fully paid up shares. 2. If not, Mr. *Cleland* is not a shareholder in the company.

SIR JOHN WICKENS, V.C.:—

The 25th section of the *Companies Act*, 1867, introduces an arbitrary rule which disables a company issuing shares from making

(1) Law Rep. 5 Ch. 270. (2) Law Rep. 4 Ch. 322–326.
(3) Law Rep. 5 Ch. 294.

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a contract with the allottee such as it could otherwise have made, unless by a written and registered contract. It seems to me unnecessary to inquire whether that section prevents a person from taking shares in the name of a trustee and paying up the amount in cash. I confess I should come very unwillingly to that conclusion. Nor is it necessary to inquire whether a payment in cash by an allottee of shares could be made by the cancellation of a debt arising from an advance of cash made to the company a day, or a week, or a year before, and the payment of which might have been immediately required from the company. It is quite clear, I think, that however those questions may be answered, a person cannot, under the 25th section, take shares and pay them up in land or in plate, as in *Elkington's Case* (1), or in personal service; and whatever may be the answer to those questions, it may well be that a person selling an estate to a company for £20,000 cannot when he does so, or on the next day, or the next week, or the next year, treat the cancellation of that debt as equivalent to a payment by him for the purchase of shares. In this case I think it clear that 200 shares were allotted to Mr. *Cleland*, not conditionally, and that he can only get rid of his liability by shewing that they were fully paid up. This he can only do by shewing a valid payment under the 25th section; or, in other words, a payment in cash. No such payment is proved, or even suggested; unless the cancellation of the debt for service is a payment in cash. To hold otherwise, no doubt, involves some difficulty; but we are dealing with an Act of Parliament which, as I said before, places, very likely for good reasons, a particular and very arbitrary limitation upon this particular class of contracts. At any rate, I feel myself bound to hold that there has been no payment in cash within the 25th section; and therefore that Mr. *Cleland* must be on the list as an allottee of 200 unpaid shares. I think the parties must have their costs out of the estate.

Solicitors for the Official Liquidators: Messrs. *Vallance & Vallance.*
Solicitors for Mr. *Cleland:* Messrs. *Mercer & Mercer.*

(1) Law Rep. 2 Ch. 511.

CARR *v.* ATKINSON.

M. R.
1872
April 25, 29.

[1871 C. 90.]

Power—Excessive Appointment—Delegated Power—Validity of Subsequent Appointment to Objects of Power.

Where the donee of a power appointed by will a life interest to *M.*, an object of the power, and then delegated to *M.* a power to appoint a life interest to a stranger to the power, and subject thereto appointed the property to the children of *M.*, who were objects of the power:—

Held, that the delegated power was void, but that the subsequent appointment was good.

SC 424

GEORGE SMITH, by his will, dated the 26th of June, 1838, devised to his trustees two closes or parcels of land at *Dewsbury*, to hold the same in trust for his niece, *Hannah Carr*, during her life, and after her decease in trust for all and every or such one or more exclusively of the others or other of her children or remoter issue for such estates, in such shares, charged with such annual or other sums of money for their or any of their benefit, and with such remainders or limitations over between or amongst them, or any of them, as the said *Hannah Carr* should appoint by some writing under her hand, and in default of such appointment, in trust for all and every the children or child of the said *Hannah Carr* equally as tenants in common.

George Smith died in 1842, leaving *Hannah Carr* surviving, who, by her will, dated the 11th of April, 1866, in exercise of the aforesaid power, and of every other power enabling her in that behalf, appointed that the trustees of the will of the said *George Smith* should stand seised of the said two closes at *Dewsbury*, upon trust to convey the same to the trustees therein named upon trust as to one-fifth part or share thereof for her daughter *Mary Hartley Atkinson* and her assigns, during her life, without impeachment of waste, for her sole and separate use, independently of the interference or control of her present or any future husband, and after her decease upon such trusts for the benefit of any surviving husband of the said *Mary Hartley Atkinson* for the term of his life, or for any shorter period as she should, notwithstanding

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coverture, by her will appoint, and subject thereto in trust for such child or children of the said *Mary Hartley Atkinson* as had attained or should thereafter attain the age of twenty-one years, or die under that age leaving issue, and if more than one in equal shares; and, as to one other undivided fifth, upon similar trusts for the benefit of her daughter *Ann Hartley Pearson*, her husband and children, as were before contained with reference to the said one-fifth appointed in favour of *Mary Hartley Atkinson*, her husband and children, but with a superadded proviso that in case there should be no child of the said *Mary Hartley Atkinson* who should attain the age of twenty-one years, or die under that age leaving issue, then (subject to any such appointment as aforesaid) upon the trusts declared concerning the other shares. And the testatrix appointed two other fifth shares to two other daughters and their children, and the remaining fifth share to her daughter *Jane Hartley Carr*, the Plaintiff, absolutely, and she appointed the Plaintiff her residuary devisee and executrix of her will with two other executors.

Hannah Carr died in 1867. *Mary Hartley Atkinson* was married in 1843 to *John Atkinson*, and had six children. *Ann Hartley Pearson* married *Edward Pearson*, but there was no issue of the marriage.

The suit was instituted by the Plaintiff for a partition of the two closes devised by the will of the said *George Smith* and appointed by the will of the said *Hannah Carr*; and the question arose, on further consideration, whether the appointment of the one-fifth share in favour of *Mary Hartley Atkinson*, her husband and children, and the similar appointment of the one-fifth share in favour of *Ann Hartley Pearson* were not in excess of the power, and wholly void except as to the life interests, or, at any rate, void so far as related to their respective husbands.

Mr. *Fry*, Q.C., and Mr. *W. Barber*, for the Plaintiff, who claimed an interest in the shares in default of appointment:—

The appointments in favour of the children of *Mary Hartley Atkinson* and her sister respectively are void for remoteness, inasmuch as they follow the life interests of "any surviving husband" in whose favour an appointment may be made; and it is possible, as any future husband is within the words, that the distribution may

be postponed beyond twenty-one years from the death of a person *in esse* at the death of the testator. We contend, therefore, that the shares go, subject to the life interests, as in default of appointment.

Mr. *Southgate*, Q.C., and Mr. *Mozley*, for another of the children of *Hannah Carr* in the same interest:—

The two shares in question go in default of appointment after the life interests of Mrs. *Atkinson* and Mrs. *Pearson*. When there is an appointment partly in favour of a person not an object of a power and partly in favour of those who are objects of the power, the gift fails *in toto*. Thus, in the case of *In re Brown's Trust* (1), where a marriage settlement contained a power for the wife to appoint to the child or children or remoter issue of the marriage, and the wife by her will appointed the fund to trustees in trust for the only son for his life, or until he should assign or incumber the same, and then for the benefit of the son, his wife and children, as the trustees should think expedient, it was held by Vice-Chancellor *Wood* that though the excessive appointment was discretionary (as the appointment in favour of the husbands is here), the appointment was void *in toto*, and not merely for the excess. The effect of excessive execution was also considered in *Alexander* v. *Alexander* (2), in *Robinson* v. *Hardcastle* (3), in *Reid* v. *Reid* (4), and in *Sugden* on Powers (5); and the result of the authorities is, that where a subsequent limitation depends upon that which is void, it must fall with it.

In *Reid* v. *Reid* it was held that an appointment to *A.* for life, who was an object of the power, and after her death to her children, who were not objects of the power, conferred on *A.* a life estate only.

Here it was clearly not the intention of the testatrix that the remainder to the children should be accelerated, and where that is the case the property must go in default of appointment. This rule was recognised by your Lordship in *Craven* v. *Brady* (6), following *Crozier* v. *Crozier* (7), though in both those cases it was

(1) Law Rep. 1 Eq. 74.
(2) 2 Ves. Sen. 640.
(3) 2 Bro. C. C. 22, 344.
(4) 25 Beav. 469.
(5) 8th Ed. pp. 508, 509.
(6) Law Rep. 4 Eq. 209, 213.
(7) 3 D. & War. 353.

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considered to be the intention of the testator that the remainder should be accelerated. In this case the testatrix intended that the appointment in favour of the husband should take effect before the gift to the children.

[The MASTER OF THE ROLLS referred to *Kennedy* v. *Kingston* (1).]

Mr. *G. Welby King*, for the representatives of two deceased children of *Hannah Carr*, in the same interest.

Mr. *Cecil Russell*, for the children of Mrs. *Atkinson*:—

The proper construction of this will is simply to strike out the words giving a power of appointment to the husband which are in excess of the power, and then the remainder will take effect: *Sugden* on Powers (2). The case of *In re Brown's Trust* (3) is distinguishable, for there the proportions in which the class were to take, to whom the excessive appointment was made, could not be determined.

In *Ingram* v. *Ingram* (4), where a husband had a power of appointing a reversionary interest in such shares as he should think fit among the issue of his marriage, and he by his will delegated the power to his wife that she might appoint as she should think proper between his son and daughter, and for want of such appointment gave the property in equal shares between his two children, it was held that the delegated power was void, but that the latter part of the gift was good. So in the present case the power to appoint to the husband is void, but the gift to the children, which is subject thereto, is good.

Mr. *Fry*, in reply.

April 29. LORD ROMILLY, M.R.:—

The question in this case is, whether the gift in the will of *Hannah Carr* in favour of the husband of *Mary Hartley Atkinson* makes the whole gift void, inasmuch as the husband was not within the terms of the power, or whether the will is to be read as if the gift to the husband formed no part of the will at all.

(1) 2 Jac. & W. 431.
(2) Page 511.
(3) Law Rep. 1 Eq. 74.
(4) 2 Atk. 88.

The case of *Craven* v. *Brady* (1), which was cited in argument, does not appear to me to be in point, for there the whole gift was held to be void because the person who was not an object of the power was one of the class of persons to whom the property was given. But this case is perfectly different, for here the share is given in trust for *Mary Hartley Atkinson* for her life, which is a good appointment, as she is an object of the power, and for such of her children as should attain twenty-one, who are also objects of the power; but then there is interposed, not a gift to a person who is not an object of the power, but a power for *Mary Hartley Atkinson* to appoint by will in favour of a person who is not an object of the power. It is important to look at the exact words: "In trust for *Mary Hartley Atkinson* during her life, . . . and after her decease upon such trusts for the benefit of any surviving husband of the said *Mary Hartley Atkinson*, for the term of his life or for any shorter period as she should notwithstanding coverture by her will appoint, and, subject thereto, in trust for" her child or children, as in the will mentioned.

This is an attempt to create a new power, which cannot be created, in a person who was merely an object of the power. This is a case arising in respect of real property. Supposing it had been given upon such trusts and in favour of such charities as *Mary Hartley Atkinson* should by will appoint, and, subject thereto, to her children, could it be said that the gifts to the children were destroyed because of the insertion of a power which the Court would not allow to be exercised? The result is, that the power to appoint in favour of the husband fails, being a delegated power which could not be given by the person who was entitled to exercise the first power, and the will is to be read as if the words which relate to it formed no part of the will, and the construction of the rest of the will is not affected by it.

I am of opinion that the cases cited do not affect this case, though I have no doubt they were well decided.

Solicitors: Messrs. *Edwards, Layton, & Jaques*, agents for Messrs. *Scholefield & Oldroyd, Dewsbury;* Messrs. *Elmslie, Forsyth, & Sedgwick.*

(1) Law Rep. 4 Eq. 209.

M. R.
1872
May 8, 23, 24.

SMITH *v.* ADKINS.

[1871 S. 18.]

Power—Instrument in Writing—Appointment by Will—Delivery—Publication.

13 LD 315

A power given to *A.* to appoint by any deed or instrument in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of two or more credible witnesses:—

Held, to be well exercised by an appointment by the will of *A.*, not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published, and acknowledged and declared to be her last will," in the presence of the attesting witnesses.

By a marriage settlement, dated the 3rd of February, 1837, certain real estate was limited "to the use of such persons for such estates and for such purposes, whether on sale or otherwise, as *Amelia Smith*" (afterwards *Amelia Adkins*) "should at any time or times during her life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of two or more credible witnesses, direct, limit, or appoint," and in default of appointment then over.

Amelia Adkins, the donee of the power, did not exercise it by any deed or instrument *inter vivos*, but by her will, dated the 13th of August, 1851, she purported to appoint the property to the Plaintiffs.

The will was signed and sealed by the testatrix in the presence of three witnesses, but it was not expressed to be "delivered" by her. The attestation clause was as follows:—"Signed, sealed, published, acknowledged, and declared by the testatrix, as and for her last will and testament, in the presence of us, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses."

The Plaintiffs, the appointees under the will, filed their bill, praying a declaration that the will operated as a due execution of the power.

The persons entitled in default of appointment, and the trustees, were Defendants to the suit.

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Mr. *Fry*, Q.C., and Mr. *W. Pearson*, for the Plaintiffs:—

The question is, whether the power here given to *Amelia Adkins* to be exercised by "any deed or instrument in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of two or more credible witnesses," has been duly exercised by a will "signed, sealed, and published," but which is not expressed to be delivered. We contend that such a will operates as a due execution of the power.

In *Buckell* v. *Blenkhorn* (1) a power to appoint in such manner as the donee of the power, "by any deed or deeds, writing or writings, with or without power of revocation and new appointments, to be by her sealed and delivered in the presence of and to be attested by one witness or more," should direct or appoint, was held to be well exercised by a will not sealed, but executed and attested according to the provisions of the *Wills Act*, 1 Vict. c. 26, s. 10.

In *Collard* v. *Sampson* (2) the same question came before the Court, but it was there considered that a title depending on such an appointment was too doubtful to force upon a purchaser. In *West* v. *Ray* (3) Vice-Chancellor *Wood* declined to follow *Buckell* v. *Blenkhorn*. In that case, however, it was admitted that a will, if it contained the necessary formalities, was a "writing" within the power, though an unsealed will could not operate as a due execution. In *Taylor* v. *Meads* (4) Lord *Westbury* overruled *Buckell* v. *Blenkhorn*, but said it was settled law that a power to be executed by a deed or instrument in writing might be well executed by will. In *Sugden* on Powers (5) the same principle is recognised. In *Orange* v. *Pickford* (6) a power to appoint by any deed or instrument in writing, to be sealed and delivered in the presence of two or more witnesses, was held to be well executed by an appointment by a will (made before the *Wills Act*), sealed and delivered, as well as signed and published, in the presence of three witnesses. In *Moodie* v. *Reid* (7) (also under the old law), a power to appoint by will, "signed and published in the presence of two

(1) 5 Hare, 131.
(2) 16 Beav. 543; 4 D. M. & G. 224.
(3) Kay, 385.
(4) 13 W. R. 394.
(5) 8th Ed. p. 218.
(6) 4 Drew. 363.
(7) 7 Taunt. 355.

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or more witnesses," was held to be well executed by the bequests of a will simply signed by the donee of the power, and attested, without any regular attestation clause, by witnesses who were simply told by the testatrix that it was her will. In *Curteis* v. *Kenrick* (1) it was held that a power to appoint by a will "signed and published" in the presence of witnesses, was well executed by a will signed and delivered, but not expressed to be published. It appears, therefore, that the "delivery" of a will is tantamount to publication. This is also recognised in *Ward* v. *Swift* (2) and in *Simeon* v. *Simeon* (3), though in that case the power in question was not considered to be well exercised. *Warren* v. *Postlethwaite* (4) is to the same effect, and there is a learned note appended to that case (5) on the meaning of publication of a will.

It follows from these cases that the publication of a will is equivalent to the delivery of an instrument *inter vivos*, and it is quite settled that it is not necessary for the attestation clause in a will to follow the exact words contained in the power: *Vincent* v. *Bishop of Sodor and Man* (6); *Doe* v. *Burdett* (7). We contend, therefore, that the power has been well exercised.

Sir *R. Baggallay*, Q.C., and Mr. *Hallett*, for the Defendants entitled in default of appointment:—

We submit that the power in question could not have been exercised by will at all. When a power is given to be exercised by any deed or instrument in writing, or by will, then it has been held that an instrument in writing could not include a will. Further, a will is necessarily a revocable instrument, so that the words here used, "with or without power of revocation," cannot apply to it. But, assuming that the power can be exercised by will, then we submit that the will of *Amelia Adkins* did not fulfil the requirements of the power, inasmuch as the will only purports to be "signed, sealed, and published," and not to have been delivered; and you cannot go into any collateral evidence as to its execution in order to establish its delivery. The case of *Buckell* v. *Blenk-*

(1) 3 M. & W. 461.
(2) 1 C. & M. 171.
(3) 4 Sim. 555.
(4) 2 Coll. 108.
(5) Ibid. 111.
(6) 5 Ex. 683; 4 De G. & Sm. 294.
(7) 4 A. & E. 1.

horn (1) is not an authority binding on the Court, as it has been overruled. The word "delivery" means the handing over of an instrument to a third party, and is only applicable to an instrument *inter vivos*: Co. Litt. (2); *Sheppard's* Touchstone (3). No such formality was gone through in the attestation of this will, and though the authorities shew that the "delivery" of an instrument includes its "publication," there is no authority to shew that "publication" is equivalent to "delivery."

Mr. *Willis Bund*, for the trustees.

LORD ROMILLY, M.R.:—

I am quite clear that this is a good execution of the power. It is quite settled that a power to be exercised by an instrument in writing may be executed by a will, that being an instrument in writing. What Sir *James Wigram* decided in *Buckell* v. *Blenkhorn* was this, that when a power may be executed by a will, then a will in any form which complies with the statute will execute the power. That is a doctrine which has been very much shaken, but before *Buckell* v. *Blenkhorn* it was well established that such a power might be so executed. An instrument in writing would include a will, provided it complied with all the formalities required by the power. Therefore the only question here is whether the will complies with all the formalities required by the power.

It was urged by Sir *Richard Baggallay* that where the person who gives a power, in the same sentence distinguishes between an instrument in writing and a will, it has been held that the instrument in writing would not include the will. I am disposed to assent to that as a matter of construction, but that is not the case here, for there is no distinction between a will and an instrument in writing. The words of the deed giving the power are these: it is "to the use of such persons for such estates and for such purposes, whether on sale or otherwise" (as comprehensive as possible), "as *Amelia Smith* at any time during her life, by any deed or deeds, or instrument in writing, with or without power of revocation, to be by her signed, sealed, and delivered, shall appoint." Now it is quite settled by all

(1) 5 Hare, 131. (2) Page 36a. (3) Page 57.

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the authorities that a will would be an instrument in writing as well as an instrument executed *inter vivos*, provided the will complies with all the requisites which have been pointed out by the testator, and I am of opinion that there is nothing at all in the terms of this power to shew that a deed only is intended, that is to say, that, provided the instrument in writing satisfies all the conditions which are required, a will shall not be a good execution of the power. The only question, in my opinion, which I have to consider is, whether this will does comply with all the conditions. It is an instrument in writing; that is settled by all these cases. What are the requisites which are to be complied with? It is to be "signed and sealed." This will has been both signed and sealed, and therefore upon that no question arises. Then the donor of the power says it must be "delivered in the presence of and attested by two or more credible witnesses." It is obvious that if the attestation clause had contained the word "delivered," it would be a good execution of the power. Now, let us see if the words here are not equivalent to the word "delivered." It is "published, acknowledged, and declared." In the case of a deed, would this be a "delivery" of the deed? If, for instance, the donee of the power had said, "I publish and declare this to be my deed," would any Court in *Westminster Hall* say that that was not a delivery of the deed? But then it is said that cannot be a delivery of a will, because a will is not, properly speaking, capable of being delivered. That is merely a reasoning in a circle, for it is admitted that if the word "delivered" is used in the attestation clause that is sufficient: but the argument is that a will cannot be delivered, whereas a will may be delivered just as much as any deed. Supposing a person having to execute a power recites a power, and says, "I wish to execute that power, and accordingly I sign, seal, and deliver this my will in the presence of you *A. B.* and *C. D.*; but I do not intend to part with the will; I intend to keep it and lock it up in my own closet;" would not that be a delivery of the will? Supposing it had been a deed with a declaration by the person executing it, saying, "It shall not take effect till my death," it might be delivered, and yet kept in the possession of the donee of the power. A will would have exactly the same effect.

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I am of opinion that a person cannot execute a will, declare it to be his will, acknowledge it to be his will, and publish it and acknowledge it in the presence of two witnesses—in which case it is clear they must hear him say he acknowledges, publishes, and declares it as his deed—without that being a delivery.

Delivery of a will is publication of a will, and I am of opinion that publication of a will is delivery of the document; and I am of opinion that that must be declared accordingly, and that this power must be declared to have been well exercised by the will of *Amelia Adkins*.

I may add that I do not mean to say anything in disparagement of *Buckell* v. *Blenkhorn* (1); I do not mean to say anything either to disparage or to sustain it, but I have decided this case upon the assumption that that case cannot be sustained.

Solicitors: Messrs. *Terrell & Chamberlain*, agents for Messrs. *Terrell & Petherick, Exeter*; Mr. *B. Hunt*, agent for Mr. *T. G. Hyde, Worcester*.

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[1869 C. 256.]

Injunction—Copyright—Illustrated Catalogue—Advertisement—Costs.

There is no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one may sell.

Where an upholsterer, who had published an illustrated furnishing guide with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain the Defendant, another upholsterer, from publishing, for the purposes of his own trade, a similar work in which many of the said engravings and portions of the letterpress of the first work were alleged to be copied:—

Held, that the Defendant could not be restrained by injunction from so copying the Plaintiff's illustrations or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the Defendant's work being a flagrant imitation of the Plaintiff's, he could be allowed no costs.

THIS was a suit by the Plaintiff, *James Cobbett*, an upholsterer and house furnisher at *Deptford Bridge*, to restrain the Defendant

(1) 5 Hare, 131.

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Francis Woodward, who carried on a similar business at *Worcester,* from printing and publishing a work called "*F. Woodward & Co.'s Illustrated Furnishing Guide.*"

The Plaintiff carried on an extensive business, and executed orders for furniture and other articles for various parts of the kingdom. In 1866 he published a work on the subject of furnishing and furniture under the title of "*Cobbett & Co.'s New Furnishing Guide,*" or the "*Illustrated Furnishing Guide,*" containing an introduction and remarks on housekeeping written by the Plaintiff himself, with numerous engravings and illustrations of designs and articles of furniture which were sold by his firm. These engravings, as the bill alleged, represented designs and patterns of articles, the drawings of which were specially made from goods manufactured and sold by the Plaintiff. The professed intention of the said work was to promote and extend the Plaintiff's business. The Plaintiff's work was registered as a new publication.

The bill alleged that the Defendant had recently caused to be printed and published, with the view of attracting customers to his own establishment, a book bearing the titles of "*F. Woodward & Co.'s Illustrated Furnishing Guide,*" or "*New Furnishing Guide,*" as a new and original work, but which was, in a great measure, copied and taken from the Plaintiff's book, and to a considerable further extent was in its style and plan, as well as in particulars, a colourable imitation thereof, and passages were cited from the introduction and other parts of the Defendant's book in part identical or very similar to certain passages in the Plaintiff's book.

The bill also alleged that the Defendant had not only adopted the plan of having illustrations in his book, but instead of having drawings made of the articles in his stock which he desired to sell, the Defendant had in his book appropriated and copied illustrations from the Plaintiff's work, and that, out of 123 illustrations contained in the Defendant's book, at least fifty had been taken from the Plaintiff's.

The bill also alleged that the Plaintiff's book and the copyright thereof had been produced by and from the Plaintiff's experience, labour, and money, and was his property, and an important adjunct to his business; that the Defendant was using the Plaintiff's property, which he had so appropriated, for the purpose of

competing with and injuring the Plaintiff in his said business, and without the Plaintiff's authority or acquiescence, and prayed that the Defendant might be restrained by injunction from issuing or distributing and also from printing and publishing his said book, or any book containing any passages or illustrations copied or colourably altered from the Plaintiff's book.

The Defendant by his answer admitted the publication of the book complained of, and stated that it had been for many years the practice of manufacturers of and dealers in articles of household furniture to print and circulate furnishing guides with priced catalogues or drawings and illustrations of the articles they manufactured or sold; that many such books were compiled before the alleged publication of the Plaintiff's book, and that in 1864 a book of that description was compiled and printed by the Defendant himself; that the articles of household furniture manufactured and sold by different manufacturers and dealers were the same, and that the designs and patterns of such articles were (with rare exceptions) in common use throughout the trade, and that the illustrations in the books of different manufacturers and dealers were generally the same in outline and design, and were frequently identical; that, with regard to the printed matter in the Plaintiff's book, there was no new or original matter which entitled the Plaintiff to a proprietorship or copyright therein; and that with regard to the illustrations which the Defendant was charged with having copied there were none which were not identical with or colourable imitations of designs or patterns previously printed by other manufacturers or dealers.

It appeared that the Plaintiff had published a previous work in 1858, considerable portions of which were, as the Defendant alleged, reproduced in his work published in 1866.

The Defendant by his answer entered minutely into the sources from which the illustrations in his work had been obtained, and the reasons for their similarity to the Plaintiff's.

Evidence was gone into on both sides which, in the view taken by the Court, it is not material to refer to.

Mr. *Southgate*, Q.C., and Mr. *Millar*, for the Plaintiff:—

The Plaintiff in this suit has established a case which will

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entitle him to the protection of the Court. An illustrated furnishing catalogue is as much the property of its compiler as any other book, and he is entitled to have his copyright protected. The compiler of a dictionary, or of a concordance to the Bible or to any standard work, such as *Shakespeare*, of which many successive editions are published, would, we submit, have a copyright in such works, and there is no distinction between them and a work of the character of the Plaintiff's. The Plaintiff's contention is supported by *Kelly* v. *Morris* (1).

It is clear, from a comparison of the Defendant's book with the Plaintiff's, that a portion of the letterpress and above fifty of the engravings are copied from the Plaintiff's book, and the evidence fails to shew that they were derived from a common source. The Court has in analogous cases interfered for the protection of authors or compilers, as in *Cassell* v. *Stiff* (2) and *Novello* v. *Sudlow* (3); and as the Defendant has, without permission or acknowledgment, availed himself of the result of the Plaintiff's labours, he must be restrained from further issuing the book complained of.

Mr. *Fry*, Q.C., and Mr. *W. Pearson*, for the Defendant:—

The Plaintiff's book does not come within the provisions of the Copyright Acts, which were intended to protect works of a literary character or of lasting benefit to mankind, and also engravings of the fine arts, but not to protect a tradesman's catalogue or its illustrations. The Plaintiff cannot have a right to sue in respect of any alleged copy or imitation taken from books which had previously appeared, and which were not protected by registration: *Murray* v. *Bogue* (4); *Rundell* v. *Murray* (5). This cannot be called an original work, for many of the illustrations are taken from other works.

Many parts of the Plaintiff's work are reproduced from a work which he published in 1858, and yet the work of 1866 was registered as a new publication. This, we submit, disentitles him to the protection of the Court, which has in other cases put a very stringent

(1) Law Rep. 1 Eq. 697.
(2) 2 K. & J. 279.
(3) 12 C. B. 177.
(4) 1 Drew. 353.
(5) Jac. 311.

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construction upon the *Copyright Act*, 5 & 6 Vict. c. 45. Thus, in *Low* v. *Routledge* (1), errors in the registry of proprietorship as to the date of the first publication of a work and the name of a publisher were held by Vice-Chancellor *Kindersley* to invalidate a subsequent assignment under the Act. *Mathieson* v. *Harrod* (2) was a similar case. The right to sue and the right to assign depend upon the same principle.

In *Leather Cloth Company* v. *American Leather Cloth Company* (3) the question was considered how far an alleged colourable imitation of a trade-mark could be permitted, and in that case it was held that, where a stamp was used by the Defendants, and the form of the printed words, the words themselves, and the pictured symbols so much differed from those of the Plaintiffs that any person with reasonable care and observation might see the difference and not be misled, there could be no case of infringement.

With regard to the printed matter, even if your Lordships should hold that a few lines have been copied from original matter in the Plaintiff's book, an injunction could only be granted in respect of that particular part: *Jarrold* v. *Houlston* (4). As regards that part which is not original matter, the question is whether the Defendant's alleged imitation has done any injury to the Plaintiff. This the Plaintiff has failed to prove: he could not, therefore, sustain an action, and ought not to obtain an injunction to restrain the publication of the Defendant's work.

Mr. *Southgate*, in reply, referred to *Lewis* v. *Fullarton* (5).

June 20. LORD ROMILLY, M.R.:—

This is a suit to restrain the Defendant from printing and publishing any copy of a work called "*F. Woodward & Co.'s Illustrated Furnishing Guide.*"

The Plaintiff carries on business on a very large scale as an upholsterer and house furnisher at *Deptford Bridge*. In the course of his business he has printed and published a guide for furnishing

(1) 33 L. J. (Ch.) 717. (3) 11 H. L. C. 523.
(2) Law Rep. 7 Eq. 270. (4) 3 K. & J. 708.
(5) 2 Beav. 6.

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houses, illustrated with a great number of drawings, representing articles of furniture and decorations, interspersed with some judicious remarks. The Defendant is a person engaged in a similar business on an extensive scale in the city of *Worcester*, and he has also published a similar book intituled "*F. Woodward & Co.'s Illustrated Furnishing Guide.*" In it he has adopted the style of the Plaintiff's work, and precisely copied, printed, and published as many as fifty-five of the Plaintiff's drawings of decorated furniture. I am convinced, on examining the evidence, that these were expressly and exactly taken from the illustrations of the Plaintiff. In addition to this the Defendant has extracted certain passages from the synopsis and introduction of the Plaintiff's work and his general remarks without acknowledgment. These require separate consideration. On the whole I am quite clear that the Defendant has availed himself of and has copied precisely the Plaintiff's work wherever he found it advisable so to do, and that he had done this without acknowledgment, but the letterpress copied does not amount to twenty lines, while the illustrations are at least fifty-five.

The question is whether, in this state of circumstances, I can restrain the Defendant by injunction from publishing his work intituled "*F. Woodward & Co.'s Illustrated Furnishing Guide.*"

The first question is, does the Defendant really sell the articles he describes in this work? and next, if he does, is he entitled to tell the public that he does so?

First, I am of opinion that he does really sell these articles. This, in fact, is not disputed. And next, I am of opinion that there is no monopoly in the construction and sale of these articles, and consequently that he is entitled to tell the world that he does so sell them. The only question is whether he is entitled to tell the world that he does so in the form and manner which is shewn by the contents of this work.

The argument relied upon by the Plaintiff for an injunction consists in drawing an analogy between this work and the compilation of such works as a post-office directory, a concordance of the Bible, or of *Shakespeare*, or a dictionary where the same work is either repeated year after year with little variation and with little addition, and where occasionally it is exactly repeated in

edition after edition as in the ordinary case of a concordance. Now, there is certainly no question that such works so compiled are protected, and though a fresh compiler might do the same thing if, to use a vulgar but significant expression, "he did it off his own bat," that is, by his own individual exertion, as if no one had ever done it before; yet if it be shewn that the fresh compiler has used the exertions of the previous compiler he will be restrained by injunction from so doing. But the distinction between those works and the present is this: those works are compiled and published for the information and use of the public, and are bought by the public without any reference to individual benefit—nothing in the shape of advertisement of articles specified in the work forming a part of the work. But this is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale.

To draw the distinction more clearly: If a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles of house furniture, or the most graceful species of decorations for articles of house furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs and with drawings of each article he described—such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet, if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser.

At the same time, I am bound to say that where it is shewn that the second advertiser has been making use literally of the drawings of the first advertiser, and copying them precisely, I think

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that the Court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor (for the rules are the same as regards the usual intercourse of life) amongst fair traders, and would not give costs to the man who deliberately endeavoured to profit by the exertions of his fellow tradesman. But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.

A different rule applies to the letterpress which is said to be copied. Wherever this letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles.

Now, examining the Defendant's work by this rule, I find the Defendant has copied some lines from the Plaintiff's synopsis. I think these were original remarks, and that the Defendant was not entitled to use them without acknowledgment of the source from whence they came. The other parts complained of cannot, I think, be treated as having any copyright.

I think the Plaintiff is entitled to an injunction, if he thinks it worth taking, to restrain the republication of the eight lines from the synopsis; but I shall give no costs, on the ground that it is a flagrant copy of the Plaintiff's work in the cases I have mentioned.

Solicitors for the Plaintiff: Messrs. *Pritchard & Englefield.*

Solicitors for the Defendant: Messrs. *Duignan, Button, & Smiles,* agents for Mr. *F. Corbett, Worcester.*

COMBE *v.* HUGHES.

M. R.

1872

June 29.

[1864 C. 159.]

Will—Share to be secured for Children of E. and their Mother—Settlement or Joint Tenancy.

Testator directed that a share of his property, upon the death of the husband of his daughter *E. H.* (which happened), should be secured for the benefit of the children of *E. H.*, and for that of their mother:—

Held, that the share must be settled upon *E. H.* for her life with remainder to her children.

WILLIAM HOPPER, by his will, dated the 4th of October, 1841, gave the residue of his property to trustees to divide among his children as therein mentioned, and with respect to the share of his daughter *Eleanor*, the wife of *Henry Hughes*, he directed that it be not paid to her, but that a sufficient portion of his Government securities should be retained and "allowed to accumulate with the growing interest continually added thereto during the lifetime of her husband, *Henry Hughes*, and, upon the death of her said husband, should there be any child or children living, that the property should be secured for their benefit, and for that of their mother," but should there be no child or children living, then the testator directed that the said share should be paid to her for her own use and benefit.

The testator died in 1843.

Henry Hughes died in 1871, leaving his widow, *Eleanor Hughes*, and seven children, all of whom attained twenty-one, surviving.

The suit was instituted by the trustees of the said will for the administration of the testator's estate so far as related to the share therein of the said *Eleanor Hughes*, and the Plaintiffs now presented a petition for the direction of the Court as to the mode in which the trust funds representing that share ought, on the death of the said *Henry Hughes*, to be applied.

Mr. *Nalder*, for the trustees.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for Mrs. *Hughes*:—

We submit that, upon the proper construction of this will, the

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share in question should be held in trust for Mrs. *Hughes* for her life, with remainder for her children. A somewhat similar case came before the Court in *Newill* v. *Newill* (1), where a testator gave all his property in these terms: "To my wife, *Anna Elizabeth Newill*, for the use and benefit of herself and all my children," and it was held that the wife and children took as joint tenants. But the present case is distinguishable, as the word "share" is used, and the testator directs that the property should be secured. In *Newill* v. *Newill* Lord *Hatherley* said (2): "I must assume that the rule is such that, although the ordinary construction of a gift to a wife and children would give a joint tenancy, if I find anything in this will which can indicate a different intention it must be followed. There are several authorities which establish such a rule, but in almost all of them reliance has been placed on some special circumstances. One of these has been the use of the word 'secured,' which the Court has laid hold of as a circumstance indicating an intention to settle the fund in the usual mode on the wife for life." In the present case that special circumstance exists, and the share should be settled accordingly.

Mr. *B. B. Rogers*, for the children of Mrs. *Hughes*:—

In this case the children are entitled with their mother to an immediate interest in the fund as joint tenants. In *Bustard* v. *Saunders* (3), where a sum of money was "directed to be secured for the benefit" of a married woman and her children, so that the same might not come to the hands of her husband, it was held that the mother and children took as joint tenants. If a testator directed his property to be secured for the benefit of his own wife and children, that, undoubtedly, would be a circumstance which would prevail against the ordinary construction of joint tenancy, but that is not the case here, and I submit that the mother is not entitled to a life interest in the fund, but that they all take as joint tenants.

Mr. *Dyne*, for the trustees of one of the daughters.

(1) Law Rep. 7 Ch. 253. (2) Law Rep. 7 Ch. 257.
(3) 7 Beav. 92.

LORD ROMILLY, M.R. :—

M. R. 1872 COMBE v. HUGHES.

I am of opinion that upon the true construction of the direction in the will, that "should there be any children the property should be secured for their benefit and for that of their mother"—the share in question should be settled upon trust for Mrs. *Hughes* for her life, with remainder to her children.

Solicitors: Mr. *Steele;* Messrs. *Freshfield;* Messrs. *Prior, Bigg, & Co.*

In re IMPERIAL WINE COMPANY.

M. R. 1872 June 29.

SHIRREFF'S CASE.

Company—Stipulation for Payment of Manager on Dismissal—Resolution to wind up—Right of Proof.

By articles of association of a company it was provided that, in case of the dismissal of *S.*, the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the company, and *S.* was appointed liquidator. *S.* had paid £2000 on his shares, and received £400 for remuneration as liquidator:—

Held, that the winding-up was equivalent to a dismissal of *S.*, and that he was entitled to prove in the winding-up for £2000, subject to a set-off of the £400.

THIS was an application, by way of adjourned summons, on behalf of *C. C. Shirreff*, formerly manager of the *Imperial Wine Company, Limited*, to be admitted to prove in the winding-up for the whole amount he had paid on his shares.

By the articles of association of the company it was stated that *Shirreff* was to be manager of the company, and had agreed to take a large number of shares, and by article 97 it was provided that, in case of the dismissal of the manager of the company, "no such dismissal shall be effectual as regards the present manager, Mr. *C. C. Shirreff*, unless the company shall, if required by him, pay him the full amount of money paid upon the shares held by him in the company, and which the directors are hereby empowered to do, and to take a transfer of such shares either to themselves or their nominee or nominees."

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Shirreff paid £2000 in respect of his shares. He continued manager until a resolution was passed for winding up the company, when he was appointed one of the liquidators, and received £400 for his services in the liquidation.

The question was, whether the 97th section of the articles was applicable to his present position on the company being wound up.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, in support of the application:—

The applicant is entitled to prove for the full amount he has paid on his shares. The 97th section of the articles expressly provides for his receiving the amount paid on his shares in the case of his dismissal from the office of manager, and we submit that a voluntary winding-up is for this purpose equivalent to a dismissal. The appointment of Mr. *Shirreff* as liquidator is a subsequent contract, and cannot affect his previous rights under the articles; and even if it does, there could be a set-off in respect of the amount he has received as remuneration.

Mr. *Miller*, Q.C., and Mr. *Everitt*, for the creditors' representative:—

The applicant has failed to establish his right of proof in this case. The articles do not contain an express covenant to pay, but only provide that he shall receive back the money paid on his shares in the event of his dismissal; clearly referring to his connection with the company being severed during the continuance of the company. The case of winding-up is not at all contemplated, and he is no more entitled to prove for the amount paid on his shares than if the company had been sold and he had been appointed manager by the purchaser. The most that he can now claim is a proper compensation for his services in the liquidation.

LORD ROMILLY, M.R.:—

I am of opinion that the resolution to wind up the company *ipso facto* put an end to Mr. *Shirreff's* employment as manager, and was equivalent to his dismissal. By the 97th section of the articles the amount paid on his shares is fixed as the proper com-

pensation to be paid him on that event. He is therefore, on the winding-up of the company, entitled to prove as a creditor for the amount of £2000; but the sum of £400, which he has received as liquidator, must be taken as in part payment of the debt.

Solicitors for the Applicant: Messrs. *Morley & Shirreff.*

Solicitors for the Creditors' Representative: Messrs. *Courtenay & Croome.*

JONES *v.* OGLE.

[1872 · J. 35.]

Will—Apportionment of Dividends—Apportionment Act, 1870.

Testator, as to his share and interest in the *L. Company*, bequeathed the dividends and income thereof to *A.* for life, and gave his residuary estate on other trusts. He died on the 21st of October, 1870. In February, 1871, a dividend was declared by the company in respect of the profits of the year ending the 1st of January, 1871:—

Held, that *A.* was entitled to the whole dividend, and that it was not apportionable under 33 & 34 Vict. c. 35, s. 2, as between *A.* and the residuary legatees.

gck D/161

affirmed by L Cs 2 J/162 Sch 192.

SPECIAL CASE.

Testator, by his will, made the following bequest:—"As to the share or interest which I have in the *Lilleshall Iron Company*, I bequeath the dividends and income thereof to my uncle for his life, and after his death the same share and interest shall belong to his two daughters in equal shares;" and he gave his residuary estate to trustees upon trust as therein mentioned, and appointed the Plaintiff his executor.

The testator died on the 21st of October, 1870.

In February, 1871, a dividend was declared by the *Lilleshall Iron Company* in respect of the profits of the year ending the 1st of January, 1871, payable by four instalments in February, April, July, and October, 1871. The total amount payable on the testator's share for the said year was £350 17*s.* 6*d.*

A question arose whether the dividend was apportionable under

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the statute 33 & 34 Vict. c. 35, s. 2. The Plaintiff, the executor, on behalf of the residuary legatees under the testator's will, claimed to be entitled to such apportioned part of the dividend as had accrued between the 1st of January, 1870, and the 21st of October, 1870, the date of his death.

By the 33 & 34 Vict. c. 35, s. 2, it is provided as follows:—

"From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

The dividend in this case is apportionable as between the testator's estate and the specific legatee. Even under the old Act, 4 & 5 Will. 4, c. 22, there would have been an apportionment of the dividends in question: *Hartley* v. *Allen* (1); *Re Maxwell's Trusts* (2). But under the new Act it is still more clear, for all dividends are to be considered as accruing from day to day; therefore, at the testator's death, the proportion of the dividend from January, 1870, up to the 21st of October, 1870, though subsequently declared, must be treated as having accrued, and must be apportioned accordingly.

Mr. *Phear*, for the Defendant:—

The *Apportionment Act*, 1870, has no application to the present case, which is quite different from one between a tenant for life and a remainderman. The question here is, whether the particular gift in the testator's will, namely, the dividends and income of his share in the *Lilleshall Iron Company*, is to be apportioned between the testator's estate and the legatee. This depends on the words of the will, by which these dividends are expressly given to the testator's uncle.

In *Clive* v. *Clive* (3), where a shareholder in a company died sixty-nine days after the meeting at which a dividend was declared,

(1) 27 L. J. (Ch.) 621. (2) 1 H. & M. 610.
(3) Kay, 600.

but before notice had been given that the same was payable, having by his will bequeathed to *A.* the interest and annual income arising from all his shares, it was held that the dividend belonged to the legatee, and not to the general estate of the testator.

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Mr. *Fry*, in reply.

LORD ROMILLY, M.R.:—

I am of opinion that this is not a case under the *Apportionment Act*, and that it depends wholly on the words of the will. The testator, as to his share and interest in the *Lilleshall Iron Company*, bequeaths "the dividends and income thereof" to his uncle for life. Under these words the Defendant is entitled to the whole of the dividend declared since the testator's death. The costs will come out of the residuary estate.

Solicitors: Mr. *Worthington Evans*, agent for Messrs. *Jones, Paterson, & Jones, Liverpool;* Messrs. *Flower & Nussey*, agents for Mr. *Heane, Newport, Shropshire.*

FUSSELL *v.* DOWDING.

M. R. 1872 July 12.

[1872 F. 7.]

Marriage Settlement—Trust for Wife if she survived her Husband—Effect of Decree for Dissolution of Marriage.

16 L.D. 565 57 L.J. 2 2 C.D. 319

By a marriage settlement the wife's property was vested in trustees upon the usual trusts, and if there should be no issue of the marriage (which was the case) it was to be in trust for the wife, her executors, administrators, and assigns, in case she survived her husband. On the wife's petition the marriage was dissolved:—

Held, that she was absolutely entitled to the property.

BY a settlement, dated the 30th of April, 1858, made on the marriage of the Plaintiff, *Maria Mary Fussell*, and *Pierre* Count *de Gendre*, certain real and personal estate to which the Plaintiff was entitled was vested in trustees upon trusts, certain of which (so far as material) were as follows: Upon trust, during the joint lives of the Count *de Gendre* and the Plaintiff, for the Plaintiff for her

not followed Fitzgerald v. Chapman 1 C.D. 573 Mod

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separate use, and if there should not be any issue of the said marriage, then the trustees should stand possessed of the trust fund in trust for the Plaintiff, her executors, administrators, and assigns, in case she survived the Count *de Gendre*, but if she should die in his lifetime, then in trust, after her decease and such failure of issue as aforesaid, to pay the income to the Count *de Gendre* for the residue of his life, and subject thereto for such persons as should be of her own kindred, in such manner as the Plaintiff should by will appoint, and in default of such appointment, for such persons as would be entitled thereto under the Statutes of Distribution, in case she had died intestate and unmarried.

There was no issue of the said marriage.

In July, 1870, the Plaintiff presented a petition to Her Majesty's Court for Divorce and Matrimonial Causes, praying for a dissolution of the said marriage, upon which a decree *nisi* for the dissolution of the marriage was obtained, and by a final decree of the said Court made on the 7th of November, 1871, the said marriage was dissolved.

The Plaintiff filed her bill against her late husband and the trustees of the settlement, praying that she might be declared absolutely entitled to the said property.

Sir *R. Baggallay*, Q.C., Mr. *Davey*, and Mr. *Solomon*, for the Plaintiff:—

We contend that, as there was no issue of the marriage, the trust in favour of the Plaintiff in case she survived her husband took effect upon the marriage being dissolved, for she is now in the same position as if the husband had died.

In *Swift* v. *Wenman* (1) a similar question came before the Court. There, under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely if she survived. There were no children of the marriage. A decree for dissolution of the marriage was made at the suit of the wife, who filed a bill claiming the trust fund, and she was held by your Lordship to be entitled to it. *Wilkinson* v. *Gibson* (2) and *Wells* v. *Malbon* (3) were decisions to the same effect.

(1) Law Rep. 10 Eq. 15. (2) Law Rep. 4 Eq. 162. (3) 31 Beav. 48.

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It is clear that the right of the husband ceased upon the decree for dissolution of the marriage, and no claim can be set up on behalf of the Plaintiff's next of kin.

Mr. *Roxburgh*, Q.C., and Mr. *W. J. Harvey*, for the Count *de Gendre*, disclaimed any interest under the settlement.

Mr. *Fry*, Q.C., and Mr. *F. J. Turner*, for the surviving trustee :—

On behalf of the next of kin of the Plaintiff, we submit that the settlement is still binding. By the construction contended for the Court would be treating as dead a man who is still living. Further, unless there is issue of the marriage a decree in the Divorce Court does not give the Court any power to deal with marriage settlements: *Graham* v. *Graham* (1); *Evans* v. *Carrington* (2).

LORD ROMILLY, M.R. :—

I am of opinion that the Plaintiff is entitled to the whole property. 16 L.D. 571.

Solicitors for the Plaintiff: Messrs. *Ellis & Crossfield*.

Solicitors for the Defendants: Messrs. *Guscotte, Wadham, & Daw*; Messrs. *Robinson & Preston*.

MONSELL *v.* ARMSTRONG.

M. R.
1872
July 12, 16

[1872 M. 20.]

Power of Sale—Administrator durante minore ætate.

A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore ætate*. 16 L.D. 50

THIS was a suit by a vendor for the specific performance of a contract for sale.

John Edgley, by his will, dated the 8th of January, 1856, bequeathed to his wife, *Sarah Edgley*, all his personal estate, subject to the payment of debts, except that as respected the mortgage

(1) Law Rep. 1 P. & D. 711. (2) 1 J. & H. 598. 6 Jur. N.S. 260 Rick. Eq. Ca. Dig. Ex. J. 481. 7 Jur. N.S. 191

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debts charged on his real estate, he directed them to be paid out of his real estate in the county of *Berks*, as the primary fund for payment thereof; and devised the residue of his real estate, after the decease of his wife, *Sarah Edgley*, to the use of his daughter, *Ann Edgley*, her heirs and assigns, subject to the payment of the mortgage debts charged thereon in exoneration of his other property, with the following proviso: "Provided always, that in case the person or persons who shall, for the time being, be entitled to the said mortgages, or any part thereof, shall require the same to be paid off, it shall be lawful for my executors or administrators, or executor or administrator, for the time being, to provide for the payment thereof by selling all or any part of the hereditaments comprised in the residuary devise hereinbefore contained, and to bargain, sell, and appoint the real estate so intended to be sold to the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, or assigns, or as he or they shall direct; and I declare that the receipts of my said executors or executor, or administrators or administrator, shall be good and sufficient discharges for all moneys therein expressed to be received; and that no purchaser shall be bound to see to the application thereof, or to inquire whether any such mortgage money as aforesaid had been called in, or whether any such sale ought to be made, nor be affected by any actual notice to the contrary of any of the parties aforesaid." And it was thereby also provided that, in case there should be any surplus money arising from such sale, the same should be invested in the name or names of the testator's "said executors or administrators, or executor or administrator," as therein mentioned. And the testator appointed the said *Sarah Edgley* and *Ann Edgley* executrixes of his said will.

The testator died in 1855, and his will was proved by the said *Sarah Edgley* and *Ann Edgley*.

Sarah Edgley died on the 28th of February, 1870, having by her will left all her property to the said *Ann Edgley* (then the wife of *Charles Monsell*), who died intestate on the 4th of March, 1870, leaving her said husband, *Charles Monsell* (who afterwards died, having by his will left all his property to his wife, who had predeceased him), and two infant children, *Charles Monsell* the younger and *Annie Monsell*, her surviving. The said infants became, on their

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father's death, entitled to the unadministered personal estate of the testator, *John Edgley*.

On the 18th of May, 1872, letters of administration with the will annexed of the personal estate of the testator left unadministered by the said *Sarah Edgley* and *Ann Edgley* (afterwards *Monsell*) were granted to the Plaintiff, *Catherine Georgina Monsell*, for the use and benefit of the said infants, *Charles Monsell* and *Annie Monsell*, and until one of them should attain the age of twenty-one years.

In July, 1871, the Plaintiff, as the administratrix of the testator, put up for sale a farm and cottage in *Berkshire*, being part of the said residuary real estate, under certain conditions of sale, by one of which it was stated that the vendor was a legal personal representative, selling under a power of sale, and that the concurrence of the persons beneficially interested should not be required. The object of the sale was to pay off the mortgage on the property, the payment thereof being required by the mortgagee.

The Defendant was declared the purchaser of the property at the sale, and signed an agreement to complete the purchase according to the conditions.

The Defendant objected to complete the purchase, mainly on the ground that the Plaintiff, being administratrix *durante minore ætate* only of the testator, was unable to exercise the power of sale contained in his will.

Mr. *Joshua Williams*, Q.C., and Mr. *W. Brodrick*, for the Plaintiff:—

The power of sale contained in the testator's will, being given to his "executors or administrators," can be properly exercised by the Plaintiff, as administratrix *durante minore ætate*, for the benefit of the infants. It is clearly settled that, though an administrator *durante minore ætate* has only a special and limited property in the estate of a deceased, he can do all acts which are incumbent on an executor, and which are for the advantage of the infant and the estate of the deceased: *Comyn's* Digest, Administration (1); *Williams* on Executors (2). It is, we submit, for the benefit of the infant children of Mrs. *Monsell* that this property should be sold, and the Plaintiff is an administratrix within the meaning of the

(1) F. 231. (2) 6th Ed. p. 469.

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power. It is the duty of the Plaintiff to pay the testator's debts, and as the mortgage debts are charged on the real estate by the bill, they cannot be paid off except by the exercise of the power of sale. The Plaintiff's contention is supported by the case of *Austin* v. *Martin* (1), where real estate was devised to *A. B.*, who was also sole executor, in trust to sell and pay the testator's debts, with power for the trustees to give discharges, and *A. B.* renounced and disclaimed. Your Lordship there held that the heir-at-law, who had taken out administration, could sell the estate and give valid receipts.

The objection raised by the Defendant cannot be sustained, and the Plaintiff is entitled to a decree for specific performance.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Hall*, for the Defendant :—

The power of an administrator *durante minore ætate* does not enable him to sell real estate. It is laid down that he may sell *bona peritura* as a bailiff may do, and he can sell a term of years for the benefit of the infant, or for the payment of debts ; but he can go no further : *Bacon's* Abr. Executors and Administrators (2). Here we submit that the power was at an end at the death of *Sarah Edgley*, when the property became vested in an owner in fee simple. Besides, it cannot be shewn that the exercise of the power, if it now exists at all, is for the benefit of the infant ; and at any rate it is too doubtful a title to force on a purchaser.

Mr. *Joshua Williams*, in reply.

July 16. LORD ROMILLY, M.R. :—

I have looked at this case very carefully, and can find no distinction between a common administrator and an administrator *durante minore ætate* as regards the exercise of a power of sale. I am of opinion that a good title can be made to the property, and that there must be a decree for specific performance with costs.

Solicitors for the Plaintiff : Messrs. *Parker, Lee, & Haddock.*
Solicitor for the Defendant : Mr. *G. E. Philbrick.*

(1) 29 Beav. 523. (2) B. 2.

AMBLER *v.* BOLTON.

[1870 A. 71.]

M. R.
1872
July 15, 16, 22.

Partnership—Dissolution—Unsaleable Asset—Valuation.

Where part of the assets of a partnership consisted of a government contract entered into in the name of one of the partners and containing a proviso against alienation :—

Held, that upon a dissolution of the partnership, the partner in whose name the contract was taken, and who continued to carry it on, must be debited in the accounts with its value, to be ascertained by a reference to Chambers.

THIS was a suit instituted by the legal personal representatives of *Benjamin Ambler*, deceased, for the purpose of taking the accounts of a partnership which had subsisted between him and the Defendant, *Thomas John Bolton*, as carriers of Her Majesty's mails in *London*. Several questions were discussed at the hearing, but the present report is confined to the mode in which the Court dealt with a government contract entered into by the Defendant in his own name, but, as the Court held, on behalf of the partnership.

The contract in question bore date the 28th of February, 1868, and was made between the Duke of *Montrose*, the then Postmaster-General, of the one part, and the Defendant of the other part; and it was thereby agreed that the Defendant, his executors, administrators, or assigns would, on and after the 1st day of April then next ensuing, and thenceforth until the said contract should be determined in the manner therein provided, convey or carry or cause to be conveyed or carried (subject as therein mentioned) Her Majesty's mails in or near *London*, as therein set forth, at the rates of payment thereby fixed. And it was thereby agreed that the contract should remain and continue in force on or from the 1st day of April then next ensuing until and including the 31st day of March, 1871, and should then determine, provided either of the said parties thereto, his executors or administrators or successors or assigns, should have given to the other of them, his executors or administrators or successors or assigns, twelve calendar months' previous notice in writing of his or their desire to that

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effect. And in case no such notice should have been given, then the contract should continue in force until one of the said contracting parties, his executors or administrators or successors or assigns, should give to the other of them, his executors or administrators or successors or assigns, twelve calendar months' previous notice in writing, dated from the 1st day of April in some one year and terminating on the 31st day of March in the then next year, of his or their desire that the contract should determine. And it was thereby provided that it should not be lawful for the Defendant, his executors or administrators, at any time or times during the continuance of the contract to give, grant, bargain, sell, assign, underlet, or otherwise part with or dispose of the contract or undertaking, or the benefit or advantage thereof, or any part thereof, or of the several covenants, matters, and things therein contained, or any of them, to any person or persons whomsoever, anything therein contained to the contrary thereof notwithstanding. And that in case the Defendant, his executors or administrators, should make breach of or default in any of the covenants or agreements therein contained and on the part and behalf of him or them to be observed and performed, then and in any such case it should be lawful for the Postmaster-General for the time being, by writing, absolutely to revoke, determine, and make void the contract.

The terms of the partnership were not expressed in writing. It appeared that originally the partners were interested in equal shares; but that an arrangement was afterwards made under which *Benjamin Ambler* became, as from the 1st of April, 1868, entitled to three-eighths of the partnership assets, and the Defendant to the remaining five-eighths. *Benjamin Ambler* died in March, 1870. After his death, and down to the present time, the Defendant continued to carry the mails under the contract, and had derived considerable profits therefrom.

The bill prayed that, as to any portion of the partnership assets and property which might not be in its nature saleable, the Defendant might, as regards the share of *Benjamin Ambler*, therein be declared a trustee thereof for the benefit of his estate.

The Defendant alleged that his partnership with *Benjamin Ambler* was confined to the working of the contract, and that the contract itself was not a partnership asset; but the Court was of a

contrary opinion. The Defendant further claimed the exclusive benefit of the contract and all profits arising therefrom subsequently to the death of *Benjamin Ambler*, on the ground that the contract could not be assigned to any person, and therefore could not be sold.

Mr. *Southgate*, Q.C., and Mr. *Ince*, for the Plaintiffs:—

The Defendant cannot claim the exclusive benefit of the contract without paying for it in some shape or other. Either we are entitled to participate in the profits so long as the contract lasts, or a value must be set on it and paid by the Defendant, as was done in *Smith* v. *Mules* (1). That the Court will not be prevented from doing justice by reason of a contract being unassignable is shewn by the case of *James* v. *Ellis*, before Vice-Chancellor *Stuart* on the 20th of December, 1870, where the mortgagor of a pension from the *East India Company* was ordered by the decree foreclosing the mortgage to execute an irrevocable power of attorney enabling the mortgagee to receive the same.

Mr. *Fry*, Q.C., and Mr. *Daniel Jones*, for the Defendant:—

The relief sought by the bill cannot be given. Why should the Defendant be deprived of the right of putting an end to the contract when he pleases? Then it is now sought to charge the Defendant with the value, and the case of *Smith* v. *Mules* is cited in support of that view. There the partnership was between three solicitors, and the articles of partnership contained an express covenant by one of the partners that he would use his best endeavours to obtain the appointment of the firm to certain offices, and that the emoluments thereof should be treated as part of the partnership profits. In direct violation of that covenant, the covenanting partner procured certain offices which fell within the covenant to be given to himself alone; and upon that the Court held that the other partner was entitled to a decree for dissolution, and to charge the Defendant with the value of the offices in the accounts. That was a totally different case from the present; and *James* v. *Ellis* has still less to do with the matter.

Mr. *Southgate*, in reply.

(1) 9 Hare, 556.

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July 22. LORD ROMILLY, M.R., having stated the facts, continued:—

I am of opinion that, under these circumstances, the contract formed part of the partnership assets, and there must be a declaration accordingly. The question then arises, how it is to be dealt with. There is a proviso which prevents the Defendant from assigning it, and therefore it cannot be sold; and as that cannot be done, a value must be put on it in the best way you can. I shall therefore refer it to Chambers to ascertain the value of the contract.

MINUTES OF DECREE:—Declare that the contract dated the 28th of February, 1868, formed a portion of the assets of the partnership heretofore subsisting between the Defendant and *Benjamin Ambler*, deceased. Declare that the said *Benjamin Ambler* and the Defendant respectively were, and that the Plaintiffs, as legal personal representatives of the said *Benjamin Ambler*, and the Defendant now are, entitled to the profits made by and arising from the said contract, and all and singular the assets of the partnership business as from the commencement of the said partnership up to and including the 31st day of March, 1868, in equal shares, and as from the 1st day of April, 1868, in the proportions following: that is to say, the said *Benjamin Ambler* and the Plaintiffs, as his legal personal representatives, were and are entitled to three equal eighth parts thereof, and the Defendant is entitled to five equal eighth parts thereof. The decree then directed, amongst others, the following accounts: An account of all the partnership assets, estate, and effects. And in taking such account, the value of the said contract of the 28th day of February, 1868, with the Postmaster-General at the date hereof is to be ascertained. And in taking such accounts the Defendant is to be charged with three-eighths of such value.

Solicitors: Mr. *T. Donnithorne;* Messrs. *Allen & Edwards.*

MACK *v.* PETTER.

M. R.
1872
July 23.

[1872 M. 52.]

Copyright—Infringement—Injunction.

The Plaintiff, the publisher of a work which he claimed to have originated, called "*The Birthday Scripture Text Book*," consisting of a printed diary interleaved, with a blank space opposite each day with a text of Scripture appended, and which was designed as a record of the birthdays of friends :—

Held, entitled to an injunction to restrain the Defendants from publishing and selling a work subsequent to the Plaintiff's, called "*The Children's Birthday Text Book*," on the ground that it was an infringement of the Plaintiff's copyright in the title of his work, as well as a colourable imitation of the same.

10 Ch D 257
13 Ch D 684
685 n.
18 Ch D 79

THIS was a suit by a publisher and bookseller to restrain the publication and sale by the Defendants, a firm of publishers, of a work alleged to be an infringement of the Plaintiff's copyright.

The Plaintiff was the proprietor and publisher of a book called "*The Birthday Scripture Text Book*," of which there had been several editions, and he claimed to have the exclusive property and copyright in the said publication long prior to the printing or publication by the Defendants' firm of another book called "*The Children's Birthday Text Book*."

The Plaintiff alleged that the *Birthday Scripture Text Book* was a very popular work, and had attained great notoriety under that title; that the whole idea and arrangement of the work was originated by himself, and was entirely novel at the time when the work was first published, and that he had derived large profits from such publication.

The said *Birthday Scripture Text Book* consisted of a printed diary, interleaved with writing paper, so arranged as to give a blank space for writing upon opposite to each day in the diary, and underneath each date was a text of Scripture, with a verse of a hymn. The book was designed as a record of the birthdays of friends, and in order that they might inscribe their names on the blank leaves opposite to the pages bearing the date of their respective birthdays.

The bill alleged that the Defendants had, since the publication of

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the Plaintiff's said book, published and sold a work under the title of "*The Children's Birthday Text Book*," arranged upon precisely the same plan as that of the Plaintiff's publication, and in fact imitated therefrom in most particulars, but differing in the selection of texts and verses, and with a colourable difference in the title, and that the preface was in part, if not altogether, pirated from the Plaintiff's work; also that it was published in a form closely resembling the Plaintiff's work in appearance, and so as to induce incautious purchasers to believe that the two works were the same.

The bill prayed that the Defendants might be restrained by injunction from printing, publishing, selling, or exposing for sale the said *Children's Birthday Text Book*, or any other book or publication bearing the same title as the Plaintiff's said publication, or such title with only a colourable variation, or containing the preface prefixed to the Plaintiff's said publication, or any parts thereof, or any book or publication so printed, bound, arranged, or contrived, as by colourable imitation or otherwise to represent or lead to the belief that such book or publication was the same as the said *Birthday Scripture Text Book*.

The Defendants submitted that there could be no copyright in such a title as that given to the Plaintiff's work, or in the general design of the publication; that they were fully entitled to publish the *Children's Birthday Text Book*, and that the Plaintiff was not entitled to come to the Court for an injunction to restrain them from its publication or sale.

Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for the Plaintiff, referred to *Hogg* v. *Kirby* (1); *Spottiswoode* v. *Clarke* (2); *Jarrold* v. *Houlston* (3); *Chappell* v. *Davidson* (4); *Braham* v. *Bustard* (5).

Sir *R. Baggallay*, Q.C., and Mr. *Westlake*, for the Defendants:—

There can be no copyright in the name of "*The Birthday Scripture Text Book*," any more than in such a name as "*Daily Text Book*," or "*Christmas Text Book*," or "*New Year's Text Book*." The only ground for the interference of the Court would be if it could be shewn that by the publication of the Defendants' work the public

(1) 8 Ves. 215.
(2) 2 Ph. 154.
(3) 3 K. & J. 708.
(4) 2 Ibid. 123.
(5) 1 H. & M. 447.

had been misled, and induced to believe that it was identical with the Plaintiff's. This, we submit, the Plaintiff has failed to establish, and is therefore not entitled to any relief.

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LORD ROMILLY, M.R.:—

I am of opinion that the Plaintiff is entitled to an injunction. The Defendants would be at liberty to publish a *Daily Text Book*, and so far to adopt the scheme of the Plaintiff's work; but it was the Plaintiff's own idea to have a text book associated with a birthday, and so to adapt it to those sentiments of religion with which most persons regard a day which marks the completion of another year of their lives. The Plaintiff is entitled to a copyright in the use of the title, "*Birthday Text Book*," whatever other words may be associated with it, and the Defendants must be restrained from the publication of their work, and they are not entitled to publish a work with such a title, or in such a form as to binding or general appearance, as to be a colourable imitation of that of the Plaintiff. The Plaintiff is entitled to the costs of the suit.

Solicitors for the Plaintiff: Messrs. *R. & W. B. Smith*, agents for Messrs. *Fry & Otter, Bristol.*

Solicitors for the Defendants: Messrs. *Ashurst, Morris, & Co.*

In re TOWNSEND'S SETTLED ESTATES.

M. R. 1872 July 24.

Practice—Leases and Sales of Settled Estates Act—Petition—Cons. Ord. XLI. *Rule* 20.

A Petition under the *Leases and Sales of Settled Estates Act* cannot be set down for hearing until the expiration of twenty-one days from the publication of the last of the advertisements, as required by rule 20 of Cons. Ord. XLI., although that time may prevent the Petition being set down till after the Long Vacation.

THIS was an application for leave to set down for hearing a Petition, under the *Leases and Sales of Settled Estates Act*, on the last Petition day before the Long Vacation, although only fourteen days would then have expired since the publication of the last of the advertisements, whereas by rule 20 of Cons.

Barton Re Taylor post 557

M. R. 1872 *In re* Townsend's Settled Estates.

Ord. XLI. it was provided that no petition under the Act should be set down for hearing until after the expiration of twenty-one clear days from the publication of the last of the advertisements.

Mr. *Colt*, in support of the application, submitted that the order might not be drawn up till after the twenty-one days, and referred to *In re Bower*, before Vice-Chancellor *Bacon* on the 14th of July, 1870, where his Honour had allowed a petition to be set down under similar circumstances.

Lord Romilly, M.R., considered that by so doing he should be defeating the Act of Parliament, and refused the application.

Solicitors: Messrs. *Peacock & Goddard.*

(a) 18 W.R. (1870) 199.

M. R. 1872 *July* 27.

In re NETTLE'S CHARITY.

Charity Scheme—Scholarship—Preference cæteris paribus—Test or Competitive Examination—Qualification of Candidates—Election by Trustees.

By a scheme for a charity connected with a grammar school at *G.* it was provided that the income should be applied towards the maintenance of a scholar at the university, such scholar to be the child of any resident of the town of *G.*, preference being given, *cæteris paribus*, to the son of a freeman of *G.*, such scholar having been taught and fitted for the university at the said school, and tried and examined in Greek and Latin and approved by certain examiners, whose examination and approbation should be delivered to the trustees, who should thereupon proceed to elect a scholar qualified as aforesaid. On a vacancy there were two candidates, *A.*, the son of a freeman, and *D.*, the son of a non-freeman. The examiners reported to the trustees that *D.* was far superior in every respect, but that they believed that *A.*, if admitted to the university, would be able in due time to pass the required examinations. The trustees elected *A.* to the scholarship.

On a petition by *D.* praying that the examination might be set aside:—

Held, that the scheme did not provide for a test, but a competitive examination; that the trustees should, under the circumstances, have followed the recommendation of the examiners; that the election must be set aside, and *D.* elected to the vacant scholarship.

THIS was a Petition by *Archibald Day*, an infant, by his father and next friend, to set aside the election to a scholarship by the

trustees of a charity in connection with the *Guildford Free Grammar School.*

By the scheme for the management of the said school it was provided as follows: "The income arising from the charity shall be applied towards the maintenance of a scholar at either of the universities of *Oxford* or *Cambridge*, the said scholar to be the child of any resident inhabitant of the town of *Guildford*, preference being given, *cæteris paribus*, to the son of a freeman of the town of *Guildford*, such scholar having been taught and fitted for the university in *Guildford Free Grammar School*, and having been taught at such grammar school not less than three years next before his election, and who shall have read and learned some Greek author, and be well instructed and knowing in the Latin tongue, and shall be tried and examined therein and be approved by the master of the said free grammar school for the time being, and also by the rector of the parishes of *Stoke-next-Guildford* and *St. Nicholas* in *Guildford* for the time being, or by any two of them, and after such scholar being examined and approved by the said approvers, or by any two of them, such their examination and approbation to be declared in writing, and to be delivered within fourteen days after Easter to the trustees, who shall thereupon proceed to elect a scholar qualified as aforesaid."

In 1871 there was a vacancy in the scholarship, when two candidates presented themselves for examination, one the son of a freeman of the town of *Guildford*, and the other, the Petitioner, the son of a non-freeman, both being otherwise eligible.

After the examination the examiners certified: "We most unhesitatingly recommend that *Day* be elected to the vacant scholarship."

The trustees requested a further report from the examiners, and desired to know whether, having regard to the provisions of the scheme, the son of the freeman was on his examination found fitted and qualified for the university.

The examiners replied that, while they adhered to their former report of the result of their examination, and considered *Day* very far superior to the other candidate in every single point of the examination, especially in his translations from Greek into English (which the other candidate declared himself quite unable to do)

M. R. 1872 *In re* NETTLE'S CHARITY.

and his translation from English into Latin prose, they could not refuse to state their belief that were the other candidate admitted to either university, he would be able to pass in due time the various examinations required of him. They added: "If the trustees consider this fitness for the university, he is so fit."

Three out of five trustees then decided on electing the candidate who was the son of a freeman to the vacant scholarship; the other two dissented.

The present Petition was accordingly presented under *Sir Samuel Romilly's Act*, praying that the said election might be declared void, and that the Petitioner might be declared to be entitled to the benefit of the scholarship.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, in support of the Petition, submitted that the trustees were bound to adopt the report of the examiners, and to elect the Petitioner to the scholarship as being the fittest candidate.

Mr. *Fry*, Q.C., and Mr. *B. B. Rogers*, for the three electing trustees:—

The scheme contemplated a test examination and not a competitive examination, which would reduce the trustees to mere nonentities. The object of the examination was to test the fitness of the candidates for proceeding to one of the universities, and if their report shewed that such fitness existed, then, under the words "preference being given, *cæteris paribus*, to the son of a freeman," the trustees would be justified in selecting the candidate to whom that description applied. In this case there is nothing to vitiate the election of the candidate to whom the scholarship has been given, as the examiners have, as we submit, certified that he fulfilled the required conditions. It was no business of the examiners to report the order in which the candidates had passed. The examination was not an examination for the scholarship, but for the purpose of shewing that those who passed were qualified to become candidates.

Mr. *Southgate*, Q.C., and Mr. *Warmington*, for the candidate who had been elected.

Mr. *Phear*, for the trustees who did not assent to the election.

LORD ROMILLY, M.R.:—

I do not think that a test qualification was contemplated by this scheme, or that the qualification of the scholar must be of a certain amount, but that the trustees were bound to choose the one who was reported to be the best scholar.

In the present case the examiners had two candidates before them, both sons of the inhabitants of *Guildford*, and therefore within the object of the scheme, and they said that the one who had done the best was *Archibald Day*.

The words in the scheme, "preference being given, *cæteris paribus*, to the son of a freeman of the town of *Guildford*," clearly mean all other things being equal.

I have myself frequently acted as trustee under similar circumstances, when what the examiners have done has been to put in a report to this effect: "*A.* has excelled in this department, *B.* in that; in the third department both were equal;" finding very little difference between them, but on the whole, by reason of the superiority of *B.* in a certain department, they have felt bound to recommend him for election by virtue of the preference clause, though they have both gone through the examination well. If it were a case of that description, I conceive that the trustees, seeing that in the opinion of the examiners the two candidates differed but slightly, would select the son of a freeman.

But here the examiners do not hesitate to say that the rejected candidate was in all respects superior to the one selected, and say in their final report on the examination that they consider *Day* "very far superior in every single point of the examination."

I consider that the words of the scheme are not open to such a construction as the trustees have put upon them; and that they were not right in refusing to appoint *Day* to the scholarship. I do not, however, deny that the words of the scheme are such that in a case similar to the one I have stated, supposing the examiners had drawn a slight balance in favour of one of the candidates, they might yet be so nearly equal that the trustees might have decided in favour of the son of the freeman. But the matter must depend very much upon the facts of each particular case. In this I am of opinion that the Petitioner is entitled. The order will be

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that the election to the scholarship be declared void, and that the Petitioner is entitled to the benefit of the scholarship.

Solicitors for the Petitioner: Messrs. *Robson, Tidy, & Herbert,* agents for Mr. *G. T. White, Guildford.*

Solicitors for the Respondents: Messrs. *Prior, Bigg, Church, & Adams,* agents for Messrs. *Capron & Sparkes, Guildford.*

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HARVEY *v.* WILDE.

[1870 H. 118.]

Practice—Administration—Creditors' Suit—Proof of Debt—Judgment against Executors—Proof of Debt against Devisees of Real Estate.

In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) *held* to be *primâ facie* evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence.

THIS was a creditors' suit for the administration of the real and personal estate of *William Wilde*, deceased, who by his will, dated the 15th of February, 1865, appointed the Defendants, *Samuel Secker Hill* and *William Wilde*, executors thereof; and also devised certain specific real estate to them upon trusts for the benefit of his daughter *Eliza Reilly* for life, and after her death for her brothers and sisters and the two sons of her deceased brother; and he empowered the said trustees to sell all his other real estate and to give receipts for the purchase-money, and directed that the proceeds should fall into his personal estate, and after payment of his debts, funeral and testamentary expenses, be divided amongst his children and grandchildren, as therein mentioned.

The testator died on the 28th of July, 1866. He had, for several years previously to his death, had dealings with the firm of *Harveys & Hudsons*, who carried on business as bankers in *Norwich;* and that firm claimed a large balance as being due to them from the testator at the time of his death, and in February, 1869, commenced an action at law against the executors for the recovery

thereof. The executors denied their liability, and alleged that a balance was due to them from the bank, and commenced a cross action against the partners in the firm for the recovery of such last-mentioned balance. Under an order of Court both actions were referred to arbitration. The parties and witnesses were heard before the arbitrator on the 27th and 30th of May, 1869, and the 17th, 18th, and 19th of February, 1870, the principal witness for the bank being Sir *Robert Harvey*, the senior partner therein. On the 18th of March, 1870, the arbitrator made his award, which however was referred back to him on a rule obtained by the executors. On the 18th and 30th of May, 1870, the parties and witnesses again were heard before the arbitrator, who made a further award, whereby, as to the action by the executors, he found that nothing was due to them from the bank, and he directed judgment should be signed in that action for the costs of the Defendants' suit; and as to the action by the bank, he found that the bank was entitled to recover from the Defendants thereto as the executors of the testator the sum of £5066 10*s.* 6*d.*, and directed that judgment should be signed in that action for the said sum and for the costs of the Plaintiffs therein. On the 13th of June, 1870, the executors again moved to refer the award back to the arbitrator, but the application was refused, and judgment was signed as directed by the arbitrator on the 14th of June, 1870.

On the 9th of July, 1870, the decree was made in this suit in the usual form, directing inquiries as to the real estate, and a sale both of the residuary and of the specifically devised real estate in the event of the personal estate proving insufficient for the payment of the testator's debts and funeral expenses.

On the 19th of July, 1870, Sir *Robert Harvey* died. On the 22nd of July following the firm of *Harveys & Hudsons* was adjudicated bankrupt.

The personal estate of the testator proved insufficient for payment of his debts, and an application was made for a sale of the real estate. Thereupon the persons beneficially interested therein required that the debt due to Messrs. *Harveys & Hudsons* should be proved as against them, and the question whether they were entitled to require such proof was now brought before the Court on an adjourned summons.

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Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the trustee in bankruptcy, pointed out that in this case the executors were also devisees in trust, and urged the hardship of requiring the debt to be established a second time, the question having been decided after full hearing, and the principal witness being now dead.

Mr. *Chitty*, and Mr. *Maidlow*, for the persons interested in the real estate, contended that the judgment was against the executors only, and could not be enforced at law against the real estate of the testator; that the devisees were clearly entitled to have the debt established as against them: *Willson* v. *Leonard* (1); that the circumstance of the executors being devisees in trust made no difference: *Morse* v. *Tucker* (2); and that as to the hardship alleged to be occasioned by the death of Sir *R. Harvey*, the executors were at a like disadvantage before the arbitrator.

[They also referred to *Morley* v. *Morley* (3).]

LORD ROMILLY, M.R.:—

I do not think that I can hold the devisees bound by the judgment; but on a claim made in a suit such as this I think I have jurisdiction to decide on which side the burden of proof lies. When a creditor brings in a claim I frequently order an action to be brought in order to decide the matter; and if, after the action has been tried and decided against the executor, it were necessary to have it tried over again against the devisees of the real estate, the delay would be endless. I think, therefore, that the judgment ought to be *primâ facie* evidence of the debt. The devisees will be at liberty to disprove it, if they can; but if they do not, I shall hold the debt binding against the real estate.

Solicitors: Messrs. *Sharpe, Parkers, & Pritchard*; Messrs. *Field, Roscoe, & Co.*

(1) 3 Beav. 373. (2) 5 Hare, 79.
(3) 5 D. M. & G. 610.

In re PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

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July 29, 30.

Benefit Building Society—Withdrawing Member—Petition to wind up—Discretion of Court.

A member of a benefit building society who had given notice of withdrawal entitling him to be paid in rotation, and who had not been paid, *held* not entitled, *ex debito justitiæ*, to an order for winding up the society; and, under the circumstances, order refused.

THIS was a Petition by *Mary Emerson*, claiming to be a creditor and contributory of the *Planet Benefit Building and Investment Society*, for the winding-up thereof.

The society was established in 1848, and was governed by rules which had been duly certified by the barrister appointed to certify rules of savings banks as being in conformity with law and the provisions of the statute 6 & 7 Will. 4, c. 32. By the rules the shares were divided into two classes, viz., investment shares and building shares. The material portions of the rules relating to investment shares were as follows:—

"12. Investment Shares.

"Investment shares shall be of two classes, viz., paid-up or part paid-up shares, and subscription shares.

"Any member may, with the consent of the directors, have allotted to him one paid-up share for every sum of £50 paid by him with entrance fee, and shall receive scrip for the same signed by two of the directors and the secretary.

"Any member may, with the consent of the directors, have allotted to him one part paid-up share by payment of £10 or more with entrance fee, to which additions may be made of not less than £5 from time to time until it shall become of the value of £50, when it shall be a paid-up share. All investments afterwards made by such member shall be first applied towards making his share a completed or paid-up share, and no member shall hereafter be registered as the proprietor of more than one part paid-up share, except such as have been already issued.

"As to the latter class, every member shall pay on each sub-

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scription share the sum of 5*s.* per month until such share, with interest and profits, shall be of the value of £50, when it shall become a paid-up share, and the member's book may be exchanged for scrip accordingly . . .

"13. Withdrawals.

"Any member desirous of withdrawing his investment shall be allowed to do so on giving one month's notice thereof in writing to the secretary. Any member desirous of discontinuing his subscriptions altogether without withdrawing his investments shall be permitted to do so, provided the same amount to at least £10, on giving one month's notice thereof in writing to the secretary, the investments previously paid, if amounting to £50 and upwards, being allowed to remain as a paid-up share, or as many paid-up shares as shall be equivalent, or if under £50 as a single part paid-up share of equivalent value, and scrip given in exchange for the subscription book accordingly, subject, nevertheless, to the provisions of rule 12 as to part paid-up shares. If several members shall give notice to withdraw at one time they shall be paid in rotation, according to the priority of notice, provided always that the widows and children of deceased members shall have precedence, and after them the holders of paid-up shares.

"All fines incurred previously to the notice of withdrawal shall be deducted from the amount which the member may be entitled to receive."

Rule 14 related to the payment of interest to investors, and the division of profits. By rule 16 the directors were empowered to borrow money from the bankers for the purpose of making advances to the allottees of building shares as often as it should be deemed advisable to allot such shares, when there should not be sufficient moneys in the hands of the bankers.

By rule 26 the rules could only be altered or repealed at a general meeting convened in manner therein prescribed, and with the concurrence of three-fourths of the members present thereat.

Rule 29 was as follows:—

"29. Reference of Disputes to Arbitration.

"The board for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction

of these rules, or any of the clauses, matters, or things herein contained, and also of any by-laws, additions, alterations, or amendments which shall or may hereafter arise between the trustees, officers, or other members of the society; and the decision of the board, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration pursuant to the 10 Geo. 4, c. 56, s. 27; and at the first meeting of the society, after the inrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the society. And in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or some one appointed by him, shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties; and each of the three arbitrators so drawn and attending shall receive 5*s.* remuneration. The costs of the reference shall be paid by such party as the arbitrators shall direct."

The Petitioner was the holder of five fully paid-up investment shares, which she had acquired at various times between the 5th of May, 1852, and the 13th of January, 1859. There were in all 4028 holders of investment shares, on which the amount of £832,800 was paid up. The society had carried on business to a very large extent. According to the balance sheet issued in August, 1871, the amount due to the society in respect of principal, interest, and fines, was £1,049,902; the amount of principal secured by mortgage was £971,300; and the balance in favour of the society was £1242 13*s.* 4*d.*

Some time after the publication of this balance sheet doubts appeared to have arisen as to the solvency of the society; and previously to the 26th of April, 1872, notices of withdrawal were given by the holders of shares to the amount of upwards of £350,000.

On the 26th of April, 1872, the Petitioner sent to the society a notice of withdrawal of the principal (£250) and interest belonging to her in respect of her shares; and on the 27th of April her solicitors wrote, threatening legal proceedings in default of payment.

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On the 2nd of May, 1872, a general meeting of the society, which had been convened pursuant to rule 26, was held, and a committee was appointed in pursuance of 10 Geo. 4, c. 56, s. 10 (the provisions of which Act are applicable to benefit building societies), to make alterations in the rules of the society. Accordingly alterations were made which provided, amongst other things, that no investment shares should thereafter be issued, and that rules 13 and 14 should be repealed, and the following rules substituted:—

"13. Any member holding an investment share or shares may give one month's notice in writing to the secretary of his desire to withdraw from the society, and on the expiration of such notice he shall cease to be a member thereof, but he shall be entitled to receive dividends in respect of his investment shares pursuant to rule 14, and to be paid the balance of the principal of his investment share or shares, when the funds of the society will admit of it, in such instalments as the directors may determine.

"14. Until the income of the society shall be available for the purpose, no payments shall hereafter be made on account of interest or profits, but in the meantime the holders of investment shares shall receive such dividends, according to the amount of their respective investments, and in part payment thereof, as the directors shall from time to time declare: the first of such dividends to be declared on the first Wednesday in August, 1872; the second on the first Wednesday in October, 1872; and thereafter half-yearly, on the first Wednesday in April and October respectively. At least one-half of the annual cash receipts of the society (after deducting all expenses) shall be applied to the payment of such dividends."

The Petitioner, having made repeated applications for payment of her principal and interest without result, caused a demand in writing under her hand, dated the 30th of May, 1872, to be served on the society, by leaving the same at its principal place of business, pursuant to sect. 199 of the *Companies Act*, 1862. This demand was not complied with, the officers of the society alleging that they had no power to deviate from the new rules. On the 24th of June, 1872, this Petition was presented, alleging that the society was insolvent, and had practically ceased to carry on its

business, or was only carrying it on for the purpose of winding up, and was unable to pay its debts; and praying for a compulsory winding-up.

A considerable mass of conflicting evidence was adduced on the question whether the society was solvent or insolvent. The Court arrived at the conclusion that the society had assets sufficient for payment of its debts in full, but that these assets were not immediately available.

It appeared that a considerable number of the shareholders who had given notice of withdrawal had withdrawn such notices subsequently to the 2nd of May; and it was alleged on behalf of the Petitioner that of the shareholders who persisted in withdrawing not more than twenty had priority to her, and that there were assets of the society immediately available for payment of all that was due to such shareholders. On behalf of the society it was alleged that only one-third of the notices originally given had been withdrawn; and that these had been withdrawn on the terms that the new rules should be strictly carried into effect.

It was also alleged on behalf of the Petitioner that the directors of the society had, without any authority, received large sums on deposit, and had, since the notices of withdrawal began to be received, applied the available assets of the society, to the extent of about £120,000, in paying off the depositors; and that the inability of the society to pay the Petitioner was, to some extent, to be thus accounted for.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Fry*, Q.C., and Mr. *Whitehorne*, for the Petitioner:—

The Petitioner has given notice of withdrawal, and has thus become a creditor of the society, and her debt is not disputed. We say that the society is unable to pay its debts, and ought to be wound up. We further say that the result of the evidence is, that the society has not assets sufficient to pay its debts; but whether this be so or not, the society has not assets available for payment of the Petitioner's debt; and the evidence of that is, that the Petitioner has served on the society a written demand, pursuant to the *Companies Act*, s. 199, 4 (a.); and that the society for three weeks neglected to pay the debt, or secure or compound for the same.

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The society allege, by way of defence, that under the new rules they are not bound to pay; but the rights of the Petitioner are governed by the rules subsisting at the time when she gave the notice of withdrawal: *Armitage* v. *Walker* (1).

Next it is said that, under rule 13, the Petitioner is to be paid in rotation, according to priority of notice, and that many other persons are entitled to be paid in priority to the Petitioner. We say that only applies to the case of several persons giving notice of withdrawal at the same time. If, however, this be not the proper construction of the rule, still there are only twenty persons now entitled to be paid in priority to the Petitioner, and there are assets in hand sufficient to pay them off; and besides, the delay in paying off the shareholders has only arisen from the directors applying the assets of the society in payment of loans on deposits for which the society was not liable, *Davis' Case* (2), but which the directors were liable to make good personally: *Richardson* v. *Williamson* (3).

Then it is also contended that the question between the Petitioner and the company ought to have been referred to arbitration under rule 29; but it has been decided that such a rule does not oust the jurisdiction of the Court: *Smith* v. *Lloyd* (4).

The new rules were obviously passed with a view to enable the company to wind itself up; but creditors cannot be deprived of their rights and compelled to accept what the directors may choose to give them.

The case of *In re Queen's Benefit Building Society* (5) shews that the Petitioner is a creditor, and she is therefore entitled to a winding-up order *ex debito justitiæ*.

Mr. *Higgins*, Q.C., Mr. *Waddy*, and Mr. *Ingle Joyce* (Sir *Roundell Palmer*, Q.C., with them), for the society:—

The society is not insolvent. Its affairs have been most prosperously conducted for many years; but during the last three or four years it has been difficult to realise the property of the society, which naturally consists to a large extent of buildings

(1) 2 K. & J. 211. (3) Law Rep. 6 Q. B. 276.
(2) Law Rep. 12 Eq. 516. (4) 26 Beav. 507.
(5) Law Rep. 6 Ch. 815.

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more or less unfinished, and consequently there has been during these years a comparative want of success. The directors, therefore, ceased to pay the interest and bonuses they had formerly paid to the shareholders, and caused an investigation to be made into the affairs of the society, the result of which was to shew that the company was perfectly solvent, but that time and care would be required in the realisation of the assets. Thereupon this Petitioner, a person in a humble rank of life, whose interest in the company is only £250, comes and demands payment. The directors, having regard to the claims of persons in a similar position, refuse it. Thereupon, without making any attempt to convene a meeting of the withdrawing shareholders, or the creditors of the company, she presents this Petition, obviously with the view of compelling payment and obtaining an unfair advantage. The Court will not encourage such an attempt.

The Petitioner has no right to come here at all; her only right is to have the matter referred to arbitration. The *Benefit Building Societies Act* (6 & 7 Will. 4, c. 32) incorporates the *Friendly Societies Act* (10 Geo. 4, c. 56). The 27th section of the latter Act requires that the rules of every society shall provide that every matter in dispute between any society and any individual member shall be referred to arbitration. The 29th rule was framed in accordance with this enactment. The Courts both of Law and Equity have recognised and enforced the principle that such disputes are to be determined in this way: *Armitage* v. *Walker* (1); *Wright* v. *Deeley* (2); *Swarbrick* v. *Williams* (before the Court of Queen's Bench on the 10th of February, 1866); *Trott* v. *Hughes* (3). No doubt this argument would not be an answer to the Petitioner's demand if she were an outside creditor; but a withdrawing member is a member for the purpose of having her claim allowed, and is subject to the provisions of the rules as to arbitration: *Armitage* v. *Walker* (4).

But even supposing the Petitioner were a creditor, still, having regard to the smallness of her claim, and the opposition of persons in a like position with herself, and the disastrous consequences which would follow if a winding-up order were made, she ought

(1) 2 K. & J. 211. (3) 16 L. T. (O. S.) 260.
(2) 4 H. & C. 209. (4) 2 K. & J. 211, 222.

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not to succeed. The *Friendly Societies Act* (10 Geo. 4, c. 56, s. 26) requires a majority of members representing five-sixths of the value of the capital to pass a resolution to dissolve the society, Here the Petitioner stands positively alone, unsupported even by a single outside creditor, and opposed by an overwhelming majority of persons in the like position with herself. Under the old rules the Petitioner would not receive payment for three years; and the new rules were passed with the double object of making provision for payment of all such claimants as the Petitioner, *pari passu*, and of averting the distress which would be caused to many of the members by the loss of income which would accrue from a complete stoppage of the payment of interest, and which must follow from a winding-up order being made. The doctrine laid down in *Bowes* v. *Hope Life Insurance Company* (1) will, no doubt, be relied upon; but the Court will exercise a discretion, and consider whether more harm or good is likely to arise from a winding-up: *In re London Suburban Bank* (2); *In re Brighton Hotel Company* (3); *In re Imperial Mercantile Credit Association* (before Vice-Chancellor *Wood* on the 26th of June, 1866); *In re Oriental Commercial Bank* (before Vice-Chancellor *Wood* on the 16th of July, 1866).

Finally, here there is a *bonâ fide* dispute as to whether the Petitioner is entitled to be paid; and under these circumstances the Court will not make an order for winding up: *In re London Wharfing and Warehousing Company* (4); *In re Catholic Publishing Company* (5); *In re Brighton Club and Norfolk Hotel Company* (before Vice-Chancellor *Kindersley* on the 26th of November, 1866).

Mr. *Roxburgh*, Q.C., and Mr. *W. W. Cooper*, for 3576 holders of investment shares, on which £809,187 had been paid up, opposed the Petition.

Mr. *E. B. Cooper*, for 367 holders of building shares, also opposed the Petition.

Mr. *Fry*, in reply:—

It is said that the Petitioner is bound by the arbitration clause;

(1) 11 H. L. C. 389. (3) Law Rep. 6 Eq. 339.
(2) Law Rep. 6 Ch. 641. (4) 35 Beav. 37.
(5) 2 D. J. & S. 116.

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that the arbitration rule ousts the jurisdiction of the Court; and that under the provisions of the statutes every such society must have an arbitration rule. If so, the Court could never make an order for winding up a benefit building society. In point of fact, however, the Court has held that it has jurisdiction to make such an order: *In re Midland Counties Benefit Building Society* (1); *In re Queen's Benefit Building Society* (2).

In truth, however, it was never intended that either the statutes or the rule should apply to such a case as this. The dispute to be referred to arbitration must relate to the construction of the rules: here it relates to the introduction of new rules. Again, the jurisdiction invoked gives relief which the arbitrator could not give: the form of award given in the schedule to the Act shews the limited nature of the power intended to be conferred on the arbitrator; and therefore the jurisdiction of the Court is not ousted: *Kelsall* v. *Tyler* (3). Again, the arbitration rule only applies to members; but by withdrawing the Petitioner ceased to be a member: *Fleming* v. *Self* (4).

It is further said that the machinery of the Court is not to be employed to enforce a disputed claim; but here there is no dispute as to the Petitioner's debt: all that is said is that the society are entitled to take their own time to pay it; and the Court will not refuse to make the order on such a ground: *In re King's Cross Industrial Dwellings Company* (5).

Mr. *Roxburgh*, in reply, as to *Kelsall* v. *Tyler*.

LORD ROMILLY, M.R.:—

This is a Petition presented by a member of a benefit building society praying the benefit of the 13th rule of the society, which entitles any person who retires to be repaid what he has paid towards the society in a certain rotation. The application is made under a sub-section of the 199th section of the *Companies Act*, 1862. In considering that Act, I make a great distinction between what I call an outside creditor and a creditor who is a

(1) 33 L. J. (Ch.) 739.
(2) Law Rep. 6 Ch. 815.
(3) 11 Ex. 513.
(4) Kay, 518; 3 D. M. & G. 997.
(5) Law Rep. 11 Eq. 149.

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shareholder in the company; and I do not think that the 199th section in that Act, when it gave a power to a creditor to call upon a company to pay him, or if not to admit that they were insolvent, was intended to apply to any case where one member of the company called upon the directors to pay him in respect of some rule of the society itself. Such a demand necessarily involves the functions not only of directors, but of all the officers of the company, and in point of fact opens all the management and the rules of the company, and those are the very things which let in the operation of the arbitration clauses. If this application had been made by an outside creditor of the company—if the company, for instance, had applied to *A. B.*, a cabinet maker, holding no shares in the company, to make a certain number of tables and chairs for the company, and had refused to pay him, then unquestionably, in my opinion, he might come, under the 199th clause, and serve the company with a notice to pay him the amount they owed him, and that if they did not pay it he should present a petition against them. But I do not think that this applies to the case of a person who is a shareholder of the company, and who therefore applies under the 13th section, which only enables those persons to be paid who have applied, and to be paid in rotation. I think, also, it is very important, in dealing with this case, to consider what the effect of a winding-up order would be, for there is no right which I consider more clear than that which the Court has of exercising its discretion and judgment with respect to the effect of winding up a company. If it had been a question solely about the arbitration clause—if it had been a question solely about the shareholder being a creditor or not—I probably should have required some little more time to consider it; but I am clearly of opinion that the facts are unfavourable to the Petitioner's claim upon this occasion, and that the Court, upon the evidence before it, ought not to make the order which is prayed for.

I will state a little more fully why I have come to that conclusion. In the first place it was strongly urged that though there were many persons who were prior to the Petitioner, yet that those persons had all withdrawn, and that, by so doing, they had put the Petitioner in the situation of being one of twenty persons only who sought to retire, and that the company had ample assets to meet

their claims. I think that it is not reasonable or fair to say that these persons, who had withdrawn their notices upon the footing of an arrangement, were to be bound by that arrangement, though the terms of it were that the company should be carried on amongst them in a manner approved of by the directors, which was totally inconsistent with the winding-up of the company. If so, it would be difficult to say that the Petitioner is entitled to be paid in priority to all those members who had only retired in consequence of an arrangement which they believed would be binding upon everybody, but which was not entered into with the Petitioner herself.

But the thing which has struck me most is, that I am satisfied that the company is perfectly solvent. About that I entertain no doubt whatever, and I believe the statements made in the affidavits of the solicitor and the chairman alike, that if time is given to the company to realise its assets, it will be found that the assets of the company amount to a million, or something like that. But the assets of the company consist of property which is of a nature almost necessarily belonging to a building society, that is to say, unfinished houses, and house property more or less finished mortgaged to the building society. It is no doubt justly observed that a person cannot say to a creditor, "I shall be perfectly solvent if you give me time to realise all the assets, but I cannot pay you now." That is a just observation, if it is applied to an outside creditor—if I may use that expression with respect to a person not being a shareholder but a simple creditor of the company—because you ought not to have embarked in such speculations or entered into such contracts unless you can pay the person with whom you dealt. But that is not this case; this is the case of one of the shareholders of the company who tries to convert herself into a creditor by giving notice of withdrawal, and, in fact, does by that means attempt to gain a priority over a great many other persons who had previously given notice to retire from the company. I doubt very much whether it is a reasonable or fair thing to use the power of this Court for the purpose of carrying such a project into execution. Then it is stated that the Petitioner did not forcibly bring this matter before the Court until she had given the society notice by her solicitors that if they could come to some

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amicable arrangement there was no need of bringing it forward, and if not a Petition would be presented. That is true, but that suggestion simply amounts to this: "If you choose to pay me my claim, the Petition will be dropped." But the Court ought not to be made the instrument of one of the shareholders of a company, whether a benefit building society or any other, for the purpose of gaining a priority over the other shareholders by means of putting in force certain rules of the *Companies Act* or the rules of the society intended for a different purpose; and the Court will then consider what it can do which will produce the greatest fairness and equity to the whole. One of the leading principles of equity is equality, to treat all persons alike, and that they should all, as nearly as possible, be put in the same situation. But what would be the effect if I made this winding-up order? I suppose the effect would be that the Respondents would go to the Petitioner and say, "Here is your money; withdraw the whole matter; it will be much better for us to pay your claim and the costs of the Petition than allow the winding-up order to go." I feel satisfied of this without considering the circumstance, which is a very pregnant one, that there are upwards of three thousand members of the society, with about £800,000 of capital, who appear and resist any order being made upon this Petition; and though it is quite clear that this matter has been made very public, and is very well known to all the world who have an interest in the society, there is not one who appears to support the Petition. It happens very rarely indeed that the Petitioner is not able to get some person to support his view of the case; but there is not one shareholder—nay, more, there is not a single creditor of the company—who comes forward to support this Petition, though it appears from the affidavits that they owe about £1,000,000. I am not at all pleased with this view of the case. I am satisfied that the Petition is only presented by this lady in order to enforce the payment of what in fact is due to her, and which she desires to have paid to her at once, contrary to the rules, under which she would not be paid for some time. I do not think the rules are illegal.

That being the case, if she adopted the course I supposed, I must look at what the consequence would be of winding up this com-

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pany. If I made the order, the wisest thing, as I have already said, would be to buy her off, and to pay whatever would be necessary for that purpose; but it would be a very unwise thing for the Court of Chancery to allow itself to be made, to use a vulgar expression, a species of cat's paw for persons to use for the purpose of getting something that they are not fairly entitled to. Unfortunately my experience of winding up companies is very great, and I find that in many of these companies, after they have got into Chambers, it has been said, "Well, the assets are nothing, or so small that the official liquidator and the solicitor cannot be paid in full; so they had better divide what property there is between them, and put an end to the whole matter." That is an exceedingly unsatisfactory state of things, and it is very unwillingly that this Court would lend itself to such a result, even though it might be done perfectly fairly and honestly. That would not be the result here, for we have got, as I think, property of very nearly the value of a million which would have to be realised. But in such cases the litigation and costs are enormous. In the first place, I should have to appoint a liquidator. Then I should have at least two, probably three or more, suggested as official liquidators. A prize of this magnitude would not be allowed to go uncontested; and after that had been settled I should have to get a list of all this property, which would have to be gradually realised. And in the meantime all the persons who are shareholders in this society—all the persons who have been receiving dividends—all the persons who have been receiving bonuses—all those persons to whom they now propose to pay an instalment upon their shares from time to time, would not get a single penny, and probably there would be a large balance or dividend to be paid to them after five or six years of winding-up at an enormous expense. The Lords Justices have said it is the duty of the Court in these cases to consider what is for the benefit of the large classes of persons with whom we have to deal in matters of this description. I feel it incumbent upon me to do so, and I feel a strong repugnance to these cases where I am obliged to allow an enormous distribution of costs out of property which ought to be divided between the shareholders or creditors. I think the Petition is ill-advised, and was presented

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for the purpose of obtaining an undue advantage, and I think it my duty to dismiss it with costs.

Solicitors for the Petitioner: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Society: Messrs. *Ingle, Cooper, & Holmes.*

M. R. 1872 — *July* 30.

In re CONTRACT CORPORATION.

GOOCH'S CASE.

Winding-up—Contributory—Transfer to Infant—Liability of past Shareholder—Companies Act, 1862, *s.* 38.

15 Eq 367.

G., a shareholder in a limited company, transferred his shares to *A.*, an infant, more than a year before the company was wound up. *A.* transferred to *D.*, also an infant, who transferred to *B.* three months before the winding-up. The transfers were all registered. *B.*, who was *sui juris* at the date of the transfer, afterwards became bankrupt:—

Held, that *G.* continued liable as a member till *B.'s* transfer was registered, and that he must be placed on the list of contributories as a past shareholder.

Revd by L.C. 3 Ch 761 & Ch 206

THIS was an application by the official liquidator of the *Contract Corporation, Limited*, to place the name of *Thomas Gooch* on list B of the contributories.

In January, 1865, forty shares in the *Contract Corporation* were standing in the name of *Gooch*.

On the 14th of January, 1865, *Gooch* transferred all his shares into the name of *Adams*, who was then an infant, and on the 21st of January, 1865, the transfer was registered.

On the 16th of August, 1865, *Adams* transferred twenty of the said shares to *Dove*, who was also an infant, and on the 23rd of August, 1865, the transfer was registered.

On the 5th of December, 1865, *Dove* transferred the twenty shares then in his name to *Beal*, which transfer was registered on the 11th of December, 1865.

On the 20th of March, 1866, a petition was presented for the winding-up of the company, on which the winding-up order was made on the 23rd of April, 1866.

In 1868 *Gooch* was placed on list A of the contributories in respect of the twenty shares remaining in the name of *Adams*.

Beal, the transferee of the other twenty shares, who was *sui juris* at the date of the transfer, afterwards became bankrupt, and the object of the present application was to place *Gooch* on list B of the contributories in respect of the last-mentioned twenty shares.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator:—

We contend that *Gooch's* full liability as a shareholder continued till December, 1865, when the twenty shares in question were transferred to *Beal*, as the transfer to *Adams* and the mesne transfer to *Dove* were both void. This being so, and *Beal* having become bankrupt, *Gooch* is liable as a part shareholder, under sect. 38 of the *Companies Act*, 1862, to be put on list B of the contributories.

Mr. *J. Brown*, Q.C., and Mr. *Bagshawe*, for Mr. *Gooch*:—

The official liquidator is precluded from disputing the title under which *Beal* took the shares, for he was accepted as a shareholder by the company. It is not, therefore, now open to him to repudiate the previous transfers, as he cannot both approbate and reprobate at the same time.

[They referred to *Curtis' Case* (1) and *Lumsden's Case* (2).

LORD ROMILLY, M.R.:—

I am quite clear that Mr. *Gooch* must be put on list B of the contributories in respect of the twenty shares in question. His liability as a member did not cease till the transfer to *Beal* was registered; the previous transfers amounted to nothing.

Solicitors for the Official Liquidator: Messrs. *Linklater & Co.*
Solicitor for Mr. *Gooch*: Mr. *H. W. Vallance.*

(1) Law Rep. 6 Eq. 455. (2) Law Rep. 4 Ch. 31.

V.-C. M.
1872
July 2, 3.

MANNOX *v.* GREENER.

[1869 M. 270.]

Legacy to Wife—Debt charged on Specific Devises—Free Occupancy of House—Right to let—Income of Real Property passes the Fee—Estate Tail.

A testator, by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use and benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property; and if she so desired, this, as well as all just debts and obligations due from him, to be discharged as the first act of his executors:—

Held, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as the rest of the property.

Bequest to wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate:—

Held, that the free occupancy of the house entitled the wife either to reside in it or to let it during her life.

Devise to sons and daughters of an equal share in all the income of real property:—

Held, that the devise of the income of the estate passed the fee.

Direction that any property might be sold except *Glencoe*, which was to remain in the family as long as there was a lineal son descendant of before-named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:—

Held, that this clause created an estate tail in possession in the eldest named son.

WILLIAM GREENER, by his will dated the 5th of April, 1857, appointed executors and trustees, and then gave his property in these terms: "To my wife, *Harriett Greener*, I bequeath all sums of money that have come to my hands as part of her patrimony, and all that in her own right by bequest or otherwise may hereafter come, for her sole use and benefit, with the option of leaving it invested in the property at 5 per cent. per annum, to be paid her quarterly, or if she wishes to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property; and if she so wishes, this, as well as all just debts and obligations due from me, to be duly discharged as the first act of my executors. In addition to this I leave her all my furniture, plate, linen, pictures, &c., in my

house at *Stratford-on-Avon* at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charge whatever, after which the effects to revert back to the estate. To my sons, *Joseph Henry*, *Albert John*, and *Arthur Ernest Greener*, as well as my daughters, *Sarah Ann Mannox*, *Mary Elizabeth Hawks*, and *Ann Maria Barnet*, I leave and devise an equal share or shares in all the income of the real property left after carrying out the above. As I have given instructions as to the sale and paying of incumbrances on the estate, I trust the Almighty will give me life to accomplish it. In that case a more fully detailed will will be necessary. Any property I possess may be sold if required, except *Glencoe*, in *Arden Street*, *Stratford-on-Avon*, a property I wish to remain in the family as long as there is a lineal son descendant of the fore-named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on."

The bill was filed for the administration of the testator's estate, and for the direction of the Court as to various questions arising under the will.

Mr. *Bristowe*, Q.C., and Mr. *W. P. Beale*, for the Plaintiffs, *Sarah Ann Mannox* and *Elizabeth Hawkes*, two of the testator's daughters, beneficiaries under and executrixes of his will:—

We say that an indefinite gift of income of real property passes the fee simple. The six children, therefore, of the testator named in that behalf are entitled to the fee in all the real property except the property called *Glencoe*, in which they only have a life interest, the subsequent part of the will conferring an estate tail male in remainder on the eldest son, with remainder over in tail male to the other sons; the tenants for life being protectors of the settlement in respect of the estates tail.

The testator's debts are charged on all the testator's real estate, including *Glencoe*.

Mr. *Glasse*, Q.C., and Mr. *Fellows*, for other children of the testator in the same interest as the Plaintiff.

Mr. *F. A. Lewin*, for another child of the testator claiming only as next of kin in anything undisposed of.

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MANNOX v. GREENER.

Mr. *Karslake*, Q.C., and Mr. *Woodhouse*, for *Joseph Henry Greener*, the testator's eldest son and heir-at-law :—

An indefinite gift of income of realty differs from a like gift of "rents and profits" of realty, which has a technical meaning, and is equivalent to a gift of the land itself: *Hawkins* on Wills (1).

The gift, being of "income," only confers life estates merely on the six children, and the remainder is undisposed of and falls to the heir-at-law.

The property called *Glencoe* is not included in the prior gift of income of all the real estate; but there is an implied gift in tail male in possession of *Glencoe* to the eldest son: *Daintry* v. *Daintry* (2).

Where, as in the case of *Glencoe*, there is a specific devise, a charge, though expressed to be on all the property, does not affect the property specifically devised: *Spong* v. *Spong* (3); *Conron* v. *Conron* (4).

Mr. *Glasse*, Q.C., cited *Maskell* v. *Farrington* (5). The specific devise not referring to the previous charge of debts, and being in a subsequent part of the will, the testator's intention must be gathered from the latter part of the will, where there is a clear specific devise free from all charges.

Mr. *Rowcliffe*, for testator's widow :—

The "free occupancy" of the house given to the widow confers a right to let it. The patrimony given to the widow must be treated as a debt, and is charged on all the testator's property, including *Glencoe*.

Mr. *Bristowe*, in reply.

SIR R. MALINS, V.C. :—

The first question to be determined is as to the effect of the clause in the will containing the bequest to the testator's wife, *Harriett Greener*. It appears that the amount of the wife's patrimony has been found by the Chief Clerk to be about £1200. Does

(1) Page 120.
(2) 6 T. R. 307.
(3) 3 Bli. (N.S.) 84.
(4) 7 H. L. C. 168.
(5) 3 D. J. & S. 338; 1 N. R. 37; 10 W. R. 728.

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the testator by this will treat the amount of her patrimony as a debt? I am of opinion that he does, because he puts it in the same clause with his debts, and charges the property, which certainly must mean *primâ facie* all his property; "the" property meaning the property which I have—that is, all my property; and he puts it on an equality with the debts, and states that it is in effect a charge on the property; "and if she so wishes"—and she does so wish—"this as well as all just debts and obligations due from me to be duly discharged as the first act of my executors." Now I take that to be a direction that, for the payment of all his just debts as well as this patrimony, it is the first duty of the executors, out of the property—that is, all and every part of his property—to raise that amount. It is, therefore, in my opinion, a charge upon every part of the property. But it has been argued, on the authority of the cases of *Spong* v. *Spong* (1) and *Conron* v. *Conron* (2), that where you specifically devise property, and do not charge that specifically devised property, it is not charged with debts or legacies. Certainly in particular cases those are conclusive authorities, but I do not think they apply to this case. I see that in the case of *Conron* v. *Conron* the charge was by a codicil, and in *Spong* v. *Spong* it was in a subsequent part of the will. In *Conron* v. *Conron*, after a specific devise made, there was a general charge by a codicil. In *Spong* v. *Spong* it was this: "*J. S.*, by a will properly executed, gave a sum of £4000, to be laid out in Government or real securities, in trust for *L.*, the wife of *S.*, for her separate use for her life; remainder to *J.* for his life; remainder to the children of *L.* by *S.*" He then devised certain lands and tenements specified to various persons named in the will, and, after bequeathing several pecuniary legacies, he concluded thus: "And I do hereby expressly charge and make liable my real and personal estate to and with the payments of the aforesaid several legacies." It was there held, reversing the decree of the Court below, that the lands specifically devised were not liable to the payment of the legacies on a deficiency of the personal estate.

Now I think all these cases must depend upon the particular form of the will; and it seems to me to make a most marked difference whether a man begins by making a charge upon all his

(1) 3 Bli. (N.S.) 84. (2) 7 H. L. C. 168.

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property, or whether he begins by making a specific devise or bequest and then charges his property, because, when he has made a specific devise or bequest, and then proceeds to charge his property, it may well be that he means "all that property which I have not already by this my will disposed of;" and accordingly I think this case falls within the decision of Lord *Cranworth* in *Maskell* v. *Farrington* (1), where these two cases of *Spong* v. *Spong* (2) and *Conron* v. *Conron* (3) were pressed upon him. The question arose as to a will which was in these terms: "*Rebekah Emmerton*, by her will, charged and made chargeable the whole of her real and personal estate and effects with the payment of her just debts"—that being at the commencement of the will before any specific bequest—"and funeral and testamentary expenses, and also with the payment of the legacies thereinafter given." She then devised specifically a copyhold messuage, which was the only real estate of which she was seised, and after giving certain pecuniary and specific legacies, she gave and bequeathed to her nephew, *T. E. Cavit*, all and singular other the residue and remainder of her real and personal estate and effects not thereinbefore specifically given or otherwise disposed of. The residuary estate proving insufficient for the payment of the pecuniary legacies, Vice-Chancellor *Kindersley* held that they were charged on the specifically devised copyhold. An appeal against that decision was presented on behalf of the specific devisees, and that having been argued, Lord Chancellor *Cranworth* says: "It has been ably argued that the Court is in this case bound by the decision of the House of Lords in *Spong* v. *Spong* and *Conron* v. *Conron*. Those decisions are governing authorities wherever the circumstances are in all respects the same; but not so when, as in the present case, other circumstances occur. Here there is one united charge of debts and legacies. So far as related to the debts it is confessed that there would be a charge on the specifically devised estate"—so, I understand, it is admitted here—"and in considering what is to be the operation of the charge with regard to the intention of the testatrix, it is impossible to separate the legacies from the debts. The legacies must therefore be a charge on the specifically devised estate."

(1) 3 D. J. & S. 338; 1 N. R. 37; 10 W. R. 728.

(2) 3 Bli. (N.S.) 84.

(3) 7 H. L. C. 168.

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Now, I read this will precisely in the same way. First of all, I hold that the testator has charged the wife's patrimony as a debt to be raised with the other debts. He then says all the debts are to be raised out of the property, which means all his property, and it is, in my opinion, a charge upon the specifically devised property.

The next question arises upon the words, "In addition to this I leave her all my furniture, plate, linen, pictures, &c., in my house at *Stratford-on-Avon* at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charges whatever, after which the effects to revert back to the estate."

I think this clause restricts the gift of the furniture and effects to an interest for life only, as it is to revert back to the estate, but the direction that she is to have the free occupancy of any house in the possession of the testator will entitle her, in my opinion, either to reside in the house or to let it, as she may think fit.

Then the next question is, it being agreed upon all hands that the eldest son takes an estate tail male in the property which the testator calls *Glencoe*, whether he is tenant in tail in remainder or tenant in tail in possession. It was argued on the part of the Plaintiff and others interested that he is tenant in tail in remainder, and not tenant in tail in possession, because it is given after a general disposition of the income of the testator's property. While on the other side, on behalf of the eldest son, to whom *Glencoe* is given, it is argued that it is excepted out of the general bequest altogether, and given to him immediately.

Undoubtedly the testator has expressed himself rather obscurely, but, looking at that which I think was his paramount object, I come to the conclusion that he did intend to except *Glencoe* altogether from this disposition and make a separate property of it. I do not think that is inconsistent with his intentions in favour of all his children, because it has been argued—and I think correctly—that if that clause applied it would have the effect of giving an estate in fee simple. It would be absurd, therefore, that he should give an estate in fee simple to all his children, and then give an estate tail in *Glencoe* to one of them. I think, therefore, though ill-expressed, "all the property" means all the property except *Glencoe;* that *Glencoe* is to go to the eldest

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son and his heir male, which will give him an estate tail in possession, with the remainder to his other brothers successively in tail in like manner. Therefore I am of opinion that, as regards *Glencoe*, the eldest son takes an estate tail male in possession.

Then the next question is, what is the effect of the bequest to the other children to whom bequests are given?

Now it has been argued in this case that a gift of the income of real estate does not pass more than a life estate, but I think it is thoroughly settled that before the *Wills Act* a devise of the rents and profits passed a real estate for life. That being the case, that which would give a life estate before the *Wills Act*, by the 28th section of that Act, gives now a fee simple.

What, then, would have been the effect before the *Wills Act* of giving the income of the real estate? In my opinion there is no distinction whatever between giving the income of the land and the rents and profits of the land. The income means the rents and profits, and the rents and profits mean the income; they are convertible terms. Therefore I am clearly of opinion that a gift of the income of the land unrestricted, is simply a gift of the fee simple of the land. Then he has given to the children of *J. H. Greener*, naming them, "the income of my real property," that is, they take all the property except *Glencoe* as tenants in fee. It will therefore be declared, first, that the wife's patrimony is to be treated as a debt and a charge on the specifically devised property, as well as on the rest of the property; secondly, that the widow is entitled to the furniture for life, and that she is entitled to the freehold house in her occupancy, either to inhabit or to let; thirdly, that the devise to the sons and daughters of the property other than *Glencoe* gives the fee. Then as to the property called *Glencoe*, it is excepted from that gift, and is an estate tail in possession in *Joseph Greener*.

Solicitors for the Plaintiff: Messrs. *Fallows & Whitehead.*

Solicitors for the Defendant: Messrs. *Gregory, Rowcliffes, & Rawle.*

In re DOWLING'S TRUSTS.

V.-C. M.
1872
July 13.

Construction of Will—Marriage under Twenty-one—Absolute Interest on attaining Twenty-one.

A testator gave the residue of his estate in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest, leaving issue, their shares to go to their children, with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for such daughter for life, and afterwards for her children:—

Held, that the daughters who had attained twenty-one, and had not married, were entitled to the whole of their shares absolutely.

9 Ch D 152

JOSEPH DOWLING, by his will, dated in November, 1850, gave to two trustees all the rest, residue, and remainder of the moneys arising from the sale and conversion of his real and personal estate, and directed them to invest the same and stand possessed thereof upon trust for all his children who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one, in equal shares; and if any or either of his children should die before their, his, or her share should become vested interests leaving issue him, her, or them surviving, then he directed that the share or shares of him, her, or them so dying should go to and be equally divided between such issue, share and share alike: Provided always, that if any or either of his children being a son or sons should die under twenty-one years of age, and being a daughter or daughters under that age and unmarried, without leaving lawful issue him, her, or them surviving, that then, and in such case, the share of him, her, or them so dying as aforesaid should go to and be equally divided between the survivor or survivors of his children and the issue of any deceased child or children: Provided also, that notwithstanding the trusts aforesaid, on the marriage of any or either of his children, being a daughter or daughters, a moiety or half-part of her or their shares of and in the trust moneys, stocks, funds, and securities should be held by the trustees upon trust to pay the annual income thereof unto

V.-C. M. 1872 *In re* Dowling's Trusts.

such daughter or daughters to and for her or their own separate use and benefit for and during her or their natural life or lives; and after her or their death or deaths, leaving issue, upon trust to hold such moieties of such share or shares for all the children of such marriage or marriages; and if any or either of his daughters so marrying should die without leaving issue who should attain the age of twenty-one years, he directed that the said moiety of the share or shares of her or them so dying should go to and be equally divided between her or their surviving brothers and sisters and the issue of such as should be dead leaving issue.

Joseph Dowling died in December, 1870, leaving his wife, *Jane Dowling*, and seven children surviving, four of whom were sons and three daughters. The three daughters had attained the age of twenty-one, and were all still unmarried.

The trustees had received the proceeds of the testator's residuary estate, and had paid the three daughters a moiety of their respective shares, but had retained the other moiety until the opinion of the Court should be expressed as to whether they were entitled to such moiety, or whether it should be held by the trustees until such time as any of the daughters should marry.

A Petition was presented by the three daughters praying that they might be declared entitled absolutely to the remaining moiety of their shares.

Mr. *Wellington Cooper*, in support of the Petition:—

There seems to be very little doubt in this case as to the right of the daughters to an absolute interest in the whole of their shares upon attaining twenty-one. In the first clause the property is given in trust for all the testator's children, the sons at twenty-one, and the daughters at twenty-one or marriage; but if any of them should die before their shares became vested, leaving issue, then the share of the deceased children to go to their issue. In the subsequent part of the will there is the proviso that, upon the marriage of any daughters, a moiety of her share shall be in trust for her for life, and then for her children. This can only have reference to the marriage of a daughter under twenty-one, for otherwise the proviso would have the effect of preventing the daughters, if unmarried, from taking their shares absolutely during

the whole of their lives. The question is settled by your Honour's decision in *Clark* v. *Henry* (1), which was affirmed on appeal (2).

A similar decision was arrived at by the Master of the Rolls in *Beckton* v. *Barton* (3); and in *Edwards* v. *Edwards* (4), where there was a gift of property to *A. durante viduitate,* and then to *B.* absolutely, with a gift to *B.'s* brother and sister if he should die leaving no children, it was held that *B.*, who survived *A.*, took an absolute vested interest not liable to be divested on his subsequent death without children. The decision in *Brocklebank* v. *Johnson* (5) was to the same effect, and there the Master of the Rolls said that, in considering a will, if two passages in it are directly opposed to each other, the latter clause will prevail; but where there is a mere inconsistency the Court will endeavour to discover from the whole the meaning of the testator, and, if possible, reconcile all its parts.

This is precisely the case here; the two clauses are inconsistent, and the simple way of reconciling all the parts is to hold that the daughters took absolute interests at twenty-one, subject only to their marrying under twenty-one, when a part of their shares would be held in trust for them and their children.

Mr. *Chester,* for the infant children.

Mr. *E. B. Cooper,* for the trustees.

SIR R. MALINS, V.C.:—

The testator gives the residue of his estate upon trust for all his children who, being sons or a son, should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry. If it had stopped there the property would have vested in any child at twenty-one or marriage; but then he goes on, "And if any or either of my children shall die before their, his, or her share shall become vested interests, leaving issue, then I direct that the share or shares of him, her, or them so dying shall go to and be equally divided between such issue."

(1) Law Rep. 11 Eq. 222.
(2) Ibid. 6 Ch. 588.
(3) 27 Beav. 99. 5 Jur. N.S. 349
(4) 15 Ibid. 357.
(5) 20 Beav. 205. 1 Jur. N.S. 318

V.-C. M. 1872 *In re* DOWLING'S TRUSTS.

That clause might have some operation with regard to sons, because they might have issue before attaining twenty-one; but it could have no operation in respect of daughters, since they could not have children without being married.

I adhere to what I decided in the case of *Clark* v. *Henry* (1), which was affirmed on appeal, that when you find the will commencing with an absolute gift at a particular period, and then a gift over in the event of death, it means in case of death taking place before that period at which the property is to become absolutely vested. The testator having given the shares to all his children who being sons shall attain twenty-one, or being daughters shall attain that age or marry, he introduces a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share shall be held by the trustees upon trust for such daughter for her separate use for life, and afterwards for her children. I read that clause, therefore, as if it were, in case any of his daughters should marry before the period at which they would take absolute interests. It therefore comes within the principle of *Clark* v. *Henry*, and means marrying before that period at which they acquire absolute interests.

The declaration will be, that the Petitioners are entitled to have the fund transferred to them absolutely, they undertaking to pay the costs of all parties.

Solicitors for all parties: Messrs. *Pickett & Mytton.*

(1) Law Rep. 11 Eq. 222.

In re BICKNELL'S SETTLED ESTATES.

V.-C. M.
1872
July 19.

Practice—Leases and Sales of Settled Estates Act—Error in Advertisements—Difference of Description between Advertisements and Petition.

In the heading of advertisements issued in pursuance of sect. 20 of the *Leases and Sales of Settled Estates Act*, under General Order XLI., rule 15, the Act is sufficiently described as "the *Leases and Sales of Settled Estates Act*."

The object of the advertisements is to give information to the parties, and where the description in them, though not so full as that in the title of the Petition, is sufficiently explicit to prevent mistakes, the Court may waive the irregularity.

THIS was a Petition under the *Leases and Sales of Settled Estates Act*, asking the sanction of the Court to a lease of certain property devised by the will of *Henry Bicknell*, of *Bognor*.

The Petitioners were the wife and children of the testator, and they were the only persons beneficially interested in the property.

The title of the Petition was in the usual form: "In the matter of an Act passed in the 19th and 20th years of the reign of Her present Majesty, intituled 'An Act to facilitate Leases and Sales of Settled Estates,' and in the matter of a dwelling-house and shop situate in the *High Street, Bognor*, in the parish of *South Barstead*, in the county of *Sussex*."

The advertisements issued in pursuance of sect. 20 of the Act under General Order XLI., rule 15, began as follows:—

"In Chancery.—In the matter of the *Leases and Sales of Settled Estates Act*, and in the matter of premises in *High Street, Bognor, Sussex*, late in the occupation of *Emily Tomsett*, butcher, part of the settled estates of *Henry Bicknell*, of *Bognor*, deceased." There was consequently an inaccuracy in the title of the Act, and the description of the property was not quite in accordance with that in the title of the Petition, and did not fully describe the locality of the property.

The property had recently come into possession of the lessors by the determination of an outstanding life interest, and the intending lessee had been already let into possession.

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Mr. *Woodroffe*, for the Petitioners:—

Where an error or insufficient description appears in the advertisements issued under the Act, but is one not likely to mislead, the Court may waive the irregularity. This was decided in *Re Nune's Settled Estates*, which came before your Honour on the 16th of March, 1867. This is only a question of compliance with a General Order by which the Court is not so completely bound as by a provision in an Act of Parliament: *In re Adams' Estate* (1). Here the only persons interested are the Petitioners and the intending lessee, who is in possession, and it is impossible that any one can be misled.

SIR R. MALINS, V.C.:—

I think the fair meaning of the Order is that notice is to be given to all persons interested in the property. I think the Act is so well known that the title given in the advertisement is sufficient. I do not think that any one would want to know in what parish *Bognor* is situated, and I think that the word "premises" is a sufficient description of a dwelling-house and shop. You may take the order.

Solicitors: Messrs. *Robinson & Preston.*

V.-C. M.
1872
June 22, 28.

HILTON *v.* HILTON.

[1867 H. 72.]

Construction—Accumulations of Income—Distribution—Hotchpot.

5 Ch D 539
17 Ch D 702

A testator who had been extensively engaged in business, after directing that his trustees should carry on his business for a period not longer than till his youngest child should attain twenty-one, and should then sell his business if it were not previously sold, and directing the sale and conversion and investment of his estate, and giving an annuity to his wife, empowered his trustees to apply "the whole or so much as they shall think fit of the annual income as a common fund for the maintenance, education, and bringing up, or otherwise for the benefit of my several children till the youngest

(1) 6 L. T. (N.S.) 604.

shall attain twenty-one, in such manner as my said trustees or trustee shall judge expedient, accumulating the surplus income in aid of the common fund, and the income and accumulation shall follow the destination of the capital whence the same shall have arisen."

The capital of the estate was directed to be divided equally amongst all the children who attained twenty-one, or being daughters married under that age, except one son, for whom a different provision was made. By a codicil the testator recited that he had made advances to some of his children, and directed that all advances should be brought into hotchpot.

The youngest child had recently attained twenty-one, and the trustees having since the testator's death applied portions of the income for the maintenance and benefit of the children, and accumulated the rest:—

Held, that the proper mode of distribution was to divide the whole accumulated fund equally among the children, they giving credit for sums allowed for maintenance with interest and for interest from the testator's death on advances made by him, the capital of the advances being to be brought into hotchpot on the division of the capital of the estate.

CHARLES JONES HILTON, by his will, dated the 10th of June, 1865, after giving his wife his household furniture and other effects and a legacy of £100, and reciting that he was then engaged in business as a cement manufacturer in partnership with his son *Philip Hilton* and with two other persons, and reciting, amongst other things, a power of introducing another son into the business, and that he had made a certain allowance to his son for carrying on the business, empowered his trustees to carry on the business for such time as to them should seem desirable, and should not exceed the period when the youngest of his children should attain the age of twenty-one years, and to make over the whole or any part of his capital employed in the business in satisfaction or part satisfaction of the share or shares of his son or sons under his will, and to appropriate to such son or sons the profit corresponding with the share of capital so made over. And he declared that, subject as therein aforesaid, and to the provisions of the then subsisting articles of partnership, or any to which he might be a party at his death, his executors or executor, or the trustees or trustee of his will for the time being, should, when and so soon as his youngest child should have attained the age of twenty-one years, and in case his business should not have been previously discontinued, offer to sell his trade or business, or his share and interest therein, together with the premises for carrying on the same, to his sons *Philip* and *Claude* jointly, in such pro-

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portions as his executors or trustees should think proper, and upon such terms as they should think fair and reasonable, but without requiring them to give anything for the goodwill. The testator then devised and bequeathed his real estate and residuary personalty to trustees upon the usual trusts for sale and conversion and investment, and after directing the payment of his debts, funeral and testamentary expenses, continued as follows:—"And I direct that when and as soon as my youngest child shall attain the age of twenty-one years, the whole of my real estate then remaining unsold, in case the same shall not have been previously disposed of, shall be sold, and my said business, in case the same shall not also have been previously disposed of or purchased by my said sons *Philip* and *Claude*, or either of them, shall, subject to the provisions of any such partnership articles as aforesaid, and to any arrangement made pursuant to the provisions of this my will, be liquidated and wound up, and the stock in trade, implements, and effects, or part or share or parts or shares thereof which shall then belong to my estate, shall be converted into money, and the produce thereof, together with the money arising from the sale of my said real estate, shall be held by the trustees or trustee for the time being of this my will upon the trusts hereinafter declared concerning my residuary personal estate."

The testator then directed his trustees to pay an annuity of £200 to his wife for life, and continued: "and subject thereto shall apply the whole, or so much as they shall think fit, of the annual income as a common fund for the maintenance, education, and bringing up, or otherwise for the benefit, of my several children until the youngest of them for the time being shall attain the age of twenty-one years, in such manner as my said trustees or trustee shall judge expedient, accumulating the surplus income (if any) in aid of the said common fund, and the income and accumulations ultimately unapplied shall follow the destination of the capital whence the same shall have arisen." The testator then directed that during the time either of his sons *Philip* and *Claude* should be receiving a share not less than one-fourth of the profits of his business, they should not be entitled to participate in the annual income of the residue of his trust property. He then set apart a sum of £4000 upon certain trusts by way of a provision

for his son *Arthur*, and continued: "And, subject to the trusts aforesaid, my trustees shall stand and be possessed of all the residue of my trust property for the absolute use of my child, if only one, or all my children equally if more than one, save and except only my son *Arthur Hilton*, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, equally to be divided between them, share and share alike." The testator then gave a direction for the settlement of the share of his son *William Henry Hilton*, and directed that his said trustees or trustee for the time being should stand possessed of three-fourths of the share to which any daughter of his should become entitled upon certain trusts by way of settlement, and he further directed that his real estate should be considered for the purposes of enjoyment and transmission as converted into personal estate. He also appointed the Plaintiffs his executors.

The testator made a codicil to his will, dated the 22nd of March, 1866, by which, after reciting that he had given to his son *Edward Charles*, on his marriage, £2000, and was about to settle on his daughter *Anna Maria*, on her marriage, £3000, and that he had already and might thereafter make advances to his sons by way of loan, he declared that on the distribution of his estate the sums of £2000 and £3000, if given, should be accounted for and brought into hotchpot; and he directed that nothing in his will or codicil should be taken to exonerate any of his sons or daughters or their respective husbands from accounting for or paying to his estate any sum or sums of money which they respectively might be indebted to him at the time of his decease, and he substituted his son *Ernest Frederick* for his son *Claude* as one of those who had the option of purchasing his business.

The testator died on the 19th of August, 1866, leaving a widow and nine children. The bill in the suit was filed on the 27th of March, 1867, and an administration decree was made on the 31st of July, 1867. The trustees, since the testator's death, carried on his business in conjunction with his partners and the son *Philip Hilton*, but no other son was taken into partnership. His interest as a partner continued to be as it was in the testator's lifetime, nominal as regarded the receipt of a share of the profits,

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and the trustees paid him sums for assisting in carrying on the business, which amounted altogether to £3745 0*s.* 3*d.* The testator had also advanced two of his other children in sums of £2000 and £3000 respectively. Since his death the trustees had made various advances for the maintenance and education of the children, and otherwise for their benefit. The youngest child of the testator, *Ernest Frederick Hilton,* attained twenty-one on the 14th of August, 1871. The advances to the children did not exhaust the income of the estate, and the residue of it had been accumulated, and the accumulations now amounted altogether to £26,298 16*s.* 7*d.*, which was invested in the names of the trustees. The shares of some of the children had been assigned or incumbered.

The arrangements for winding up the business were not quite completed, and consequently the *corpus* of the estate, which was considerable, was not ready for distribution.

The present Petition was presented by the trustees of the will, who were the Plaintiffs in the suit. Its object was to enable the accumulated fund to be distributed. It prayed that it might be declared whether the payments already made to or on behalf of the children for maintenance or advancement were or were not to be brought into hotchpot and to be accounted for by them in the division of the common fund, and whether the advances made to them or on their behalf respectively by the testator during his life, or by the Petitioners since his death, were to be accounted for by them with or without interest.

Mr. *Glasse,* Q.C., and Mr. *Whitehorne,* appeared for the Plaintiffs, the trustees.

Mr. *Shapter,* Q.C., and Mr. *Dixon,* for *Philip Hilton,* the son who had managed the business, and another son:—

The testator intended that all unapplied income should form an accretion to the capital, and be divided amongst the children bringing into hotchpot the sums allowed for maintenance as well as the advances. This view is supported by *Cooper* v. *Martin* (1), *Andrewes* v. *George* (2), and *Poole* v. *Poole* (3).

(1) Law Rep. 3 Ch. 47. (2) 3 Sim. 393.
(3) Law Rep. 7 Ch. 17.

Mr. *Bristowe*, Q.C., and Mr. *Bardswell*, for children who had received maintenance after the testator's death:—

It would be manifestly unjust to insist upon bringing into hotch-pot sums allowed for maintenance, the children who were of age at the testator's death having been maintained by him during his lifetime. If, however, the sums advanced during the testator's lifetime are charged with interest, the question will be comparatively immaterial.

Mr. *Miller*, Q.C., Mr. *Turner*, Mr. *Pearson*, Q.C., and Mr. *Horton Smith*, for other parties, took the same view.

Mr. *Cotton*, Q.C., and Mr. *Freeman*, for a married daughter and her husband:—

The fund now in question must be treated as income. It was once income, and the trustees might have distributed it as such. The rights of the children ought not to be affected because the trustees chose to keep in their hands what they might and ought to have distributed.

Mr. *Higgins*, Q.C., and Mr. *Rigby*, for an assignee in bankruptcy of the life interest of *William Henry*, the son whose share had been settled:—

This is a positive trust for the application of the income for maintenance and otherwise for the benefit of the children. All that might have been distributed as income must continue to be treated as income, and all sums allowed whether for maintenance or advancement must be brought into account. An assignee is entitled to all that might have been received by the bankrupt if he had remained solvent: *Kearsley* v. *Woodcock* (1). Where there is an absolute gift, though expressed to be for a particular purpose, the donee is entitled to receive the gift though he does not require it for the purpose specified: *In re Sanderson's Trust* (2); *Snowdon* v. *Dales* (3); *In re Coe's Trusts* (4).

Mr. *May*, for the husband of one of the daughters:—

In any case the discretion of the trustees was gone when the

(1) 3 Hare, 185.
(2) 3 K. & J. 497.
(3) 6 Sim. 524.
(4) 4 K. & J. 199.

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bill was filed: *In re Williams' Settlement Trusts* (1); *Collins* v. *Vining* (2).

Mr. *Glasse*, in reply:—

It has been often decided that the filing of a bill by trustees does not, like payment of money into Court by them, constitute an abandonment of a discretion reposed in them.

There is no doubt that if there is a gift to an individual who is *sui juris* with a direction to accumulate the income of the fund for his benefit, he is entitled to claim payment at once, but this rule does not hold where the accumulation is for the benefit of other persons. *Snowdon* v. *Dales* (3) is quite an exceptional decision, and is never considered an authority.

SIR R. MALINS, V.C.:—

The testator in this suit, *Charles Jones Hilton*, being largely engaged in trade and having a wife and nine children, made his will, dated the 10th of June, 1865. His eldest son *Philip* was in a nominal partnership with him, and one of his objects was that the business should be carried on till his youngest child attained the age of twenty-one years, at which time it was to be sold, two of the sons having a right of pre-emption, and the business has, as I understand, now been disposed of. The reason why the testator postponed the division till the youngest child attained twenty-one is plainly because during the whole of that period the business, which no doubt was a very profitable one, must have been exposed to some of the risks of business, and therefore, as he authorized it to be carried on at the expense of his estate, the whole estate might have been required for it, and consequently no division of the capital under this particular will could have taken place till the period arrived, which did arrive on the 14th of August last.

[His Honour then read the clause of the will granting the annuity of £200 to the testator's widow, and the clauses above set out, and continued:—]

Nothing can be more plain than that each of the six children who were of age at the testator's death would, but for the fact of

(1) 4 K. & J. 87. (2) 1 C. P. Coop. temp. Brougham, 472.
(3) 6 Sim. 524.

the business having to be carried on, have been entitled, as a matter of absolute right, to one-eighth of the property.

It is unnecessary to cite or refer to cases upon such a point. It is a settled rule of this Court that when property is once absolutely vested in a person who is *sui juris*, he is entitled to receive it, although it may be directed to be accumulated for a period beyond the time of vesting, even though it has been directed to be paid at a future period. So in *Saunders* v. *Vautier* (1), where the testator gave a sum of *East India* Stock to his son upon attaining twenty-one, but not to be paid till he attained twenty-five, it was held that he was entitled to a transfer, and the restriction was disregarded. Therefore, in this case, though there is a direction to accumulate what is not wanted till the youngest child attains twenty-one, the Court would never think of keeping these children's property in suspense during a period which might have extended to the whole of twenty-one years. The rule of the Court is, that where a party has an absolute vested interest in property, and can give a discharge for it, he is entitled to an immediate transfer notwithstanding any restriction on the right to possession. But I agree that, under the peculiar circumstances of this case, a transfer could not have been enforced on account of the carrying on of the business.

Then, the business having been sold, and the youngest child having attained twenty-one last August, the question is how the rights of the parties are to be dealt with, having regard to the fact that from 1866, when the testator died, to the present time, some of the children have had moneys advanced for their maintenance and support and their education, and others have had nothing, or smaller sums. It is plain that if I regard the will, as in my opinion I am bound to regard it, as making a gift of all the testator's property to be equally divided amongst his children who had or should have attained twenty-one years, that object will be attained by taking the property as it was at the death of the testator, and considering each child as having at that time an absolute vested interest in his share and then treating whatever has been advanced to any child, whether by way of advance, which case is provided for by the will, or by way of maintenance and education or support, as an advance in respect of that child's share.

(1) 4 Beav. 115.

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That will make a completely equal division, which no other way will.

Take, for instance, the case of two sons, and suppose one to be prudent, and not to require any advances, and the other to be thoughtless and extravagant, and always in want of money, which is advanced to him. According to my view, complete justice would be done by making the one who had received advances restore them, by charging them in his account, and any other course would make the prudent and cautious child suffer for the extravagance of the other. There can be no doubt that the testator intended equality, and though Mr. *Glasse* has strongly pressed upon me that the accumulation is not, in respect of each share, for the benefit of the party entitled to it, but of the whole, I can find no clause in the will under which advances made to one child may be paid out of the share of another. But if that were so, and one of the children should have received even more than he was entitled to, when the final division takes place complete justice can be done by treating each child as entitled to one-eighth, and bringing into hotchpot the complete fund, including all that has been received in any way whatever, and then dividing the whole, charging each share with what has been received in respect of it. I can find nothing in the will against that mode of division. So far from that, the words are: "Shall follow the destination of the capital whence the same shall have arisen"—that is, to be paid to the child at twenty-one. So that the result is, that so much of the income as the child does not take will go in augmentation of his share of the capital as it existed at the death of the testator.

On these grounds, therefore, I think that the proper rule to follow is to divide the property as nearly as possible as it would have been divided if the business had not been carried on. Therefore I am of opinion that the proper mode of dealing with the will is, that the children must bring into account all sums which may have been received by them either by way of advances from the testator, or subsequent maintenance or advancements, and with interest from the death of the testator in the case of payments made in his lifetime, and in the case of payments made subsequently, from the time of their being made; the corpus of the advances by the testator to be brought into hotchpot when the capital should be

divided, and that subject thereto the accumulations should be divided equally, so that, as against the fund now to be distributed, the sums allowed for maintenance and advancements, and the interest thereon and on the advances by the testator, would alone have to be brought into hotchpot.

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Solicitors: Messrs. *Kingsford & Dorman;* Messrs. *Hughes, Hooker, & Buttanshaw;* Messrs. *Scott & Co.*

WILSON *v.* NORTHAMPTON AND BANBURY JUNCTION RAILWAY COMPANY.

[1871 W. 146.]

V.-C. M. 1872 *July* 24.

Privileged Communications before Litigation—Solicitors and Clients.

In a suit against a company for specific performance of a contract dated in 1863, production was required from the company of correspondence passing, before the institution of the suit, between the former engineer and solicitors of the company, and between the present solicitors and the secretary and the agents, sub-agents, engineers, surveyors, and directors of the company, and cases and opinions of counsel advising on behalf of the company in respect of the subject-matter of the suit:—

Held, that the whole of this correspondence relating to the subject-matter of the contract, which might lead to litigation, whether it had done so or might do so, or whether it was probable or improbable that it would do so, was privileged, and production was refused.

Lord Walsingham v. *Goodricke* (1) and *Hawkins* v. *Gathercole* (2) not followed.

IN the year 1862 the Defendants, the *Northampton and Banbury Junction Railway Company*, projected a railway, which was intended to pass through a portion of the Plaintiff's property; the Plaintiff opposed the bill and presented a petition to the House of Lords praying that it might not pass into law as it then stood. Negotiations in consequence took place, and an agreement was entered into on the 6th of July, 1863, between the Plaintiff and the company, whereby the company, in consideration of the Plaintiff's withdrawing his opposition to the bill, agreed, amongst other things, to erect a station and other works at a particular place therein specified upon the line of the railway. The railway was

(1) 3 Hare, 122. (2) 1 Sim. (N.S.) 150.

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opened for traffic in the year 1871, but the Defendants had refused to make a station at the place indicated by the agreement of June, 1863, in consequence of which this bill was filed by the Plaintiff for the specific performance of the agreement. In the progress of the cause an affidavit of documents had been made by the Defendants, referring to certain documents which the Defendants refused to produce.

The case came on upon an adjourned summons, and the following were the documents now required by the Plaintiff to be produced, namely, the correspondence which had passed between the former engineer and solicitors of the company, and between the present solicitors of the company and the secretary, and the agents, sub-agents, engineers, surveyors, and directors of the company, and cases and instructions to, and opinions, memoranda, and remarks of counsel advising on behalf of the company in respect of the subject-matter of this suit, all of which communications took place subsequent to the contract of June, 1863, but previous to the commencement of this litigation and before the litigation was in contemplation.

The Defendants objected to the production of these documents on the ground that the correspondence was of a private and confidential nature, passing as it did between the respective representatives of the company and their legal advisers, and on their exclusive behalf, and therefore privileged from production to the Plaintiff.

Mr. *Daniel Jones*, in support of the summons to produce:—

We ask for an order for production in the terms of *Lord Walsingham* v. *Goodricke* (1), where Vice-Chancellor *Wigram* decided that written communications which had passed between the Defendant and his solicitor before any dispute had arisen between the parties to the suit, were privileged so far as they contained legal advice or opinions, but not otherwise, although relating to the matters which formed the subject of dispute. The communications we require to see, passed between the parties previous to the commencement of the litigation, and contain matter relating to the subject in dispute, such as reports from the engineers and sur-

(1) 3 Hare, 122.

veyors of the company, which would effectually prove upon what basis the company acted in selecting sites for their stations, and how far they were influenced by the Plaintiff's opposition. It is probable that these communications will go far to settle the present dispute, and according to this authority they are not privileged. In *Hawkins* v. *Gathercole* (1) letters which passed between the Defendant and his solicitor in reference to the subject of dispute, but did not contain legal advice, were ordered to be produced; and in *Paddon* v. *Winch* (2) correspondence before the institution of the suit was held not to be privileged. The documents now required passed between the parties before the commencement of this litigation, and contain other matters besides legal advice, and are therefore liable to production.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Defendants:—

In the case of *Lord Walsingham* v. *Goodricke* (3) the opinion expressed by the Vice-Chancellor shews that he was not satisfied with his decision in the case, and he said that there was no essential difference with respect to the privilege of professional confidence, between cases stated for the opinion of counsel and other communications. These documents, containing, as they do, the reports of persons employed by the company and representing them, and sent for their exclusive guidance in dealing with the difficult questions arising in the construction of a railway, are essentially of a private and confidential character, and ought under any circumstances to be protected; and whether they passed at the time of the execution of the contract, or when this litigation first commenced, can make no difference, as they relate exclusively to the subject of the dispute. If such documents were liable to production it would prevent parties from obtaining any advice and information for their guidance. The circumstances which occurred in *Cossey* v. *London and Brighton Railway Company* (4) very much resemble the present case. There the directors received from their medical adviser a report relating to an accident which had occurred to a man, with a view to a settlement of his claim, and it was decided that the communication was privileged, although at the time the report was

(1) 1 Sim. (N.S.) 150.
(2) Law Rep. 9 Eq. 666.
(3) 3 Hare, 122.
(4) Law Rep. 5 C. P. 146.

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sent in there was no contemplation of litigation arising out of the case; and the decision in *Macfarlan* v. *Rolt* (1) supports our view. It would be highly detrimental to the public if such communications were not privileged. It would prevent all confidence between clients and their legal advisers in the conduct of their disputes.

SIR R. MALINS, V.C.:—

It appears that during the pendency of the bill in Parliament for the construction of this railway the Plaintiff, Mr. *Wilson*, who was a considerable landed proprietor, was desirous of having a station at a particular place. In consideration of his withdrawing opposition to the bill, the company, by a contract dated in June, 1863, contracted with him to erect a station of a particular description at a particular place. The company obtained their Act in 1863, but the line was not opened for traffic till the end of 1871. When the railway was completed it became, for the first time, important for Mr. *Wilson* to have his station made. A correspondence took place, but it appears that the company and Mr. *Wilson* could not agree about the station. He accordingly filed this bill on the 22nd of June, 1871, for specific performance of the contract to erect a station. The affidavit of documents made by the Defendants is not complained of. It is sufficient. But this motion is for the production of the documents referred to in the affidavit.

The documents which are in dispute are the letters which have passed between the company and their solicitors subsequent to the contract, but previous to the litigation commencing, and when it was not even in contemplation. The question, therefore, is, whether letters or communications passing between the solicitor and the client before the litigation commenced, but which afterwards did commence, relating to a contract which had been entered into and which led to the litigation, are privileged?

There are three authorities relied upon in support of the application. First of all, *Lord Walsingham* v. *Goodricke* (2), where Sir *J. Wigram* undoubtedly decided the point in the way in which Mr. *Jones* contends this case ought to be decided. In that case there had been a treaty for the purchase and sale of land. Com-

(1) Law Rep. 14 Eq. 580. (2) 3 Hare, 122, 126.

munications had taken place between the parties after the contract, and before litigation was in contemplation. The question was whether those documents were liable to be produced. Sir *James Wigram*, who was a great authority on such subjects, said:—"In this case, whilst the treaty for the sale and purchase of an estate was in progress (according to the Defendants' version of the case), after the treaty had become ripened into a perfect contract (according to the Plaintiff's view of it), but certainly (according to the representation of both parties) before any dispute had arisen, the Defendant from time to time consulted his solicitor on the subject, and written communications passed between them. The question is, whether these communications are privileged, regard being had to the circumstance that they took place before any dispute arose, though with reference to the very subject in respect of which that dispute has since arisen." Then he says: "If the matter were *res integra* I should scarcely hesitate to decide in favour of the privilege. The reasoning which applies to the case of discovery sought from the solicitor, and which I take from the case of *Greenhough* v. *Gaskell* (1), would apply with equal force to the case of discovery sought from the client in this case. If (said the Lord Chancellor) the privilege did not exist at all, every one would be thrown upon his own legal resources deprived of all professional assistance, and a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous." It appears to me the reasoning of the Lord Chancellor in *Greenhough* v. *Gaskell* is perfectly satisfactory.

The actual decision, not the opinion, of Sir *James Wigram* was followed by Lord *Cranworth*, very shortly after he became Vice-Chancellor, in the case of *Hawkins* v. *Gathercole* (2). It is pretty clear that the case did not receive much consideration from Lord *Cranworth* on that occasion, because he says: "I think that in this case I am relieved from the necessity of entering at any length into the question whether these documents ought to be produced

(1) 1 My. & K. 98, 103. (2) 1 Sim. (N.S.) 150.

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or not; for it seems to me that this is the very point decided by Vice-Chancellor *Wigram* in *Lord Walsingham* v. *Goodricke*" (1). Therefore because Sir *James Wigram* had so decided, contrary to his own opinion, Lord *Cranworth* decided it in the same manner.

The only other case relied on by Mr. *Jones* was a decision of Vice-Chancellor *James;* but there it was not the letters passing between the Defendant and the solicitor, but between the Defendant and other persons. Therefore they were not privileged.

Such being the state of the authorities, and the opinion of Sir *James Wigram* being against the application now made by Mr. *Jones*, although his decision was the other way, what is the true principle? I think cases of this kind are better decided upon principle. Here is a contract entered into which has led to litigation, and how is it possible for anybody to point out the precise moment between the date of the contract and the filing of the bill when the dispute arose? In the present case it happens to be a long time which has elapsed—from 1863 to 1871—eight years before the litigation commenced. How is it possible in this or in any other case to point out what is the precise date—not when the litigation commenced, for that would be the filing of the bill, but when the dispute arose and when the litigation became probable? I think it is impossible to say. It is of the highest importance, as laid down in *Greenhough* v. *Gaskell* (2), that all communications between a solicitor and a client upon a subject which may lead to litigation should be privileged, and I think the Court is bound to consider that every contract entered into for the sale of land or for the making of a railway station such as this, or almost any contract entered into between man and man, or between a man and a public body, may lead to litigation before the contract is completed. Any correspondence passing between the date of the contract which afterwards becomes the subject of litigation and the litigation itself is, in my opinion, on principle, within the privilege extended to the non-production of communications between solicitors and clients. I desire, therefore, to decide this case, not in accordance with the actual decision of Sir *James Wigram*, but in accordance with his plainly-expressed opinion, as stated in that passage cited from Lord

(1) 3 Hare, 122. (2) 1 My. & K. 98, 103.

Cottenham in *Greenhough* v. *Gaskell* (1), that it is absolutely essential to the interests of mankind that a person should be free to consult his solicitor upon anything which arises out of a contract which may lead to litigation; that the communications should be perfectly free, so that the client may write to the solicitor, and the solicitor to the client, without the slightest apprehension that those communications will be produced if litigation should afterwards arise on the subject to which the correspondence relates.

Vice-Chancellor *Wickens*, in the case of *Macfarlan* v. *Rolt* (2), seems to have taken that view. I entirely agree with him.

The same view was taken by the present Lord Chancellor in *Walsham* v. *Stainton* (3), and certainly the same view is very distinctly expressed in the judgment of Sir *Montague Smith* in the case of *Cossey* v. *London, Brighton, and South Coast Railway Company* (4), where the very documents which were required to be produced shew the extreme danger of the extension of that principle; because in that case it appears that an accident having occurred upon the railway and the Plaintiff having been injured, the company not contemplating litigation—at least it does not necessarily follow that they contemplated litigation at that time—sent their medical officer to see the person who was injured, and that medical officer made a report. The application was, that the report of the medical officer should be produced in order that the damages might be assessed against the railway company. Very likely at the time that report was made the railway company contemplated only doing what was right, namely, making fair and proper compensation to the man who was injured; but when he made what they considered an exorbitant demand upon them, they resisted it. The man brought an action, and the litigation commenced. That case shews the extreme danger of confidential communications between the medical officer of the company and the company under such circumstances as that being produced.

The principle of that case appears to me to be binding. There the Court of Common Pleas unanimously decided that the report of the medical officer could not be produced.

Therefore, on the broad general principles on which I desire to

(1) 1 My. & K. 98, 103.
(2) Law Rep. 14 Eq. 580.
(3) 2 H. & M. 1.
(4) Law Rep. 5 C. P. 146.

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be understood as deciding this case, all correspondence between solicitors and clients relating to the subject-matter of a contract which has been entered into, and which may lead to litigation—whether it has done so or may do so, whether it is probable or improbable that it will do so—ought certainly to be privileged.

My decision will therefore be, that the protection claimed for the correspondence and for the cases and opinions is sufficient. The books to be produced, with liberty to the Defendants to seal up, on affidavit of the secretary, any part of the books not relating to matters in question in the suit, and any parts containing entries of directions or communications to or from the solicitors, or directions to them or their agents with reference to the litigation. The costs will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Johnson, Farquhar, & Leech.*
Solicitors for the Defendants: Messrs. *Bircham & Co.*

V.-C. M. 1872 *March* 17.

PEAKMAN *v.* HARRISON.

County Court Appeal—Revival of Debt under Insolvency.

In 1859 *W.* became insolvent and obtained his discharge. The Defendant was at that time a scheduled creditor for £200. In 1865 *W.* gave to the Defendant a bill of sale on his furniture and effects to cover the prior debt of £200 and further advances with interest at £5 per cent. Sundry payments were made by *W.*, who was charged £15 per cent. interest; and the amount due, apart from the £200, was reduced to £38. In February, 1867, *W.* gave the Defendant a note of hand for £100. The Defendant then seized under the bill of sale, and sold the furniture and effects for £121, paying thereout £40 due to the landlord. *W.* became bankrupt in October, 1867, and the Plaintiff was creditors' assignee:—

Held (affirming the decision of the Judge of the *Dudley* County Court), that the £200 due prior to the insolvency could not be revived; that the bill of sale was a security only for the advances made thereon with interest at £5 per cent., and not for any further advances; that the seizure was illegal, and the £40 paid to the landlord was an improper payment; and that the £121 realised by the sale must be refunded.

THIS was an appeal by the Defendant *William Harrison* against a decree of the Judge of the County Court at *Dudley* of the 8th of October, 1870. The case was stated as follows:—

1. The Plaintiff was the creditors' assignee of *John Cecil Westley*, who was duly adjudicated bankrupt under the Bankruptcy Acts, 1849 and 1861, on the 1st day of October, 1867.

2. In January, 1859, *J. C. Westley* took the benefit of the statutes for the relief of insolvent debtors, and was at that time indebted to the Defendant in the sum of £200, which was secured by a mortgage. Such last-mentioned debt was inserted in the schedule of debts made out and delivered by *J. C. Westley* according to the provisions of the said statutes. On the 13th of April, 1859, *J. C. Westley*, after having given a warrant of attorney as required by the statutes, was adjudged to be entitled to his discharge.

3. In 1865 the bankrupt applied to the Defendant for the loan of £180, and he advanced him that sum, less the sum of £27, which the Defendant charged and deducted for discount, in consideration of the bankrupt giving security as hereinafter mentioned, not only for the sum of £180, but also the old debt of £200, and interest at £5 per cent.

4. The security then taken was an indenture of mortgage, or bill of sale, dated the 6th day of December, 1865, upon the furniture and effects of *J. C. Westley*, which was duly executed and registered, and made between the bankrupt *Westley* of the one part, and the Defendant *Harrison* of the other part.

5. Sundry payments were made by *J. C. Westley* towards satisfaction of the moneys due upon the bill of sale. These payments were entered by the Defendant in two books of account, at the commencement of which *J. C. Westley* professed to contract for payment not only of the sums of £200 and £180, but also for payment of sundry fines, and interest at the rate of £15 per cent. per annum, whereas the bill of sale was silent as to fines, and stipulated only for interest at £5 per cent. per annum. On the 1st of February, 1867, *J. C. Westley* borrowed a further sum from the Defendant, who at the time of such further loan alleged that there remained due to him the said sum of £200, and also £38 as the balance of the sum of £180 previously advanced as herein stated. The further loan was for the nominal sum of £100 secured by the note of hand of *J. C. Westley*. The said sum of £100 was thus dealt with by the Defendant. The sum of £38 was retained to discharge the balance alleged to be remaining due of the said sum of £180,

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£15 was retained for one year's interest or discount at the rate of £15 per cent. per annum. The remaining £47 was paid to *J. C. Westley*. At the time of this further loan nothing was said by either the Defendant or *J. C. Westley* about the bill of sale. The said sum of £38 alleged to be due from *J. C. Westley* as the balance of the said sum of £180, was only so due upon the assumption of the Defendant's right to charge fines and interest according to the rules in the before-mentioned books of account instead of according to the terms of the bill of sale. If the Defendant was bound by the terms of the bill of sale, the amount due in respect of the said sum of £180 was only £9 9*s.* 1*d.*, and not £38; at any rate the whole of the said sum of £180 was by and out of the further loan in February, 1867, fully discharged. In respect of such further loan, *J. C. Westley*, before the seizure and sale next hereinafter stated, made various payments to the Defendant.

6. In the month of September, 1867, the Defendant caused all the household furniture and effects of *J. C. Westley* to be seized and sold, alleging that he was entitled so to do by the power contained in the bill of sale. Out of the proceeds of the sale the Defendant paid to the landlord of the premises occupied by *Westley*, who had signed a warrant of distress and given notice to the Defendant of his intention to distrain, the sum of £40 6*s.* 4*d.* for rent and expenses. The furniture and effects so seized and sold constituted the whole estate of *J. C. Westley*, who thereupon became bankrupt, and the Plaintiff was appointed the creditors' assignee of his estate and effects.

7. The Plaintiff filed his plaint in equity in the County Court of *Worcestershire*, holden at *Dudley*, and thereby prayed that the alleged revival of the debt of £200 might be declared illegal and void as against him, and that accounts might be taken of the proceeds of the sale of the property comprised in such bill of sale, and of the sum justly due to the Defendant at the time of sale on the security of the bill of sale; and that the Defendant might be ordered to pay to the Plaintiff what, on taking such accounts, might be found due, and for other relief.

8. In pursuance of the decretal order made by the Judge of the said County Court, the Registrar of the Court took various accounts and made various inquiries, the result of which was embodied in the Registrar's certificate, dated the 15th of April, 1870.

9. On the 8th day of October, 1870, the plaint came on for further hearing, and the following points were urged by the Defendant:—

1. That he had a right, notwithstanding the insolvency proceedings, to revive as against the Plaintiff the said sum of £200, and to take security therefore by the bill of sale.
2. That the further loan of the 1st of February was covered by the bill of sale.
3. That notwithstanding the taking of such bill of sale the Defendant was entitled to have the accounts taken on the footing of the terms contained in the before-mentioned books of account, as distinguished from the terms of the bill of sale.

The Plaintiff contested all the above propositions, and after hearing the arguments of counsel on behalf of the Plaintiff and Defendant, the Judge decided:—

1. That the bill of sale was not good in law in respect of the sum of £200 so scheduled in the proceedings under the insolvency of *J. C. Westley*, and in respect of which he obtained his order of discharge under the Insolvency Acts.
2. That if the bill of sale was to be properly construed as covering any new advance whatever, as to which His Honour expressed a doubt, yet it could be construed as extending only to money lent expressly upon the security thereof and not to debts generally.

For these reasons he thought the entry under the bill of sale was illegal, and he found that the proceeds of the levy under it were due from the Defendant to the Plaintiff, and he ordered the Defendant to pay the Plaintiff the sum of £121 3*s*., the gross proceeds of such sale, and he ordered the Defendant to pay costs.

The Defendant appealed against this decree.

Mr. *Cotton*, Q.C., and Mr. *Horsey*, in support of the appeal:—

The decree made by the County Court Judge is erroneous in declaring that the original debt of £200 is void as against the bankrupt. This debt was not illegal or void by the statute, but

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was revived by the promise to pay made subsequently to the insolvency. This is consistent with the principle laid down by *Hatt* v. *Verdier* (1), and there was a similar decision in *Brook* v. *Wood* (2), where it was held that a subsequent promise to pay a debt from which the party had been discharged by operation of the Bankrupt and Insolvent Laws, must be explicit and distinct, or it would not be sufficient to support an action of assumpsit against a debtor so discharged by act of law.

The decree for payment by the Defendant of £121 3*s.* is erroneous, since that sum was realised by him under the bill of sale, to the benefit of which he was entitled as a security not only for the £200, but also for the further loan of the 1st of February, 1867. The Defendant paid £40 out of this sum to the landlord to forego the distress, and the only sum he retained was £80 16*s.* 11*d.* towards payment of the amount due to him under the bill of sale. If we are right in these contentions the decree of the County Court Judge is also erroneous in ordering the Defendant to pay the costs.

Mr. *Glasse*, Q.C., and Mr. *Warmington*, for the Plaintiff:—

The debt barred by the insolvency of *Westley* was not capable of being subsequently revived. This is clearly settled by the case of *Smith* v. *Alexander* (3). In that case a Defendant, having taken the benefit of the *Insolvent Act* (7 Geo. 4, c. 57), induced one of his creditors to give him fresh credit by executing a warrant of attorney for the old and the new debt. The Court set aside a judgment signed on that warrant to the extent of the old debt. Justice *Williams* there said: "This is a new security for the payment of a portion of that for which the Defendant has been discharged. I think the Act of Parliament prevents him from incurring this liability in the manner in which another person might have done. It appears to me that in whatever manner a party tries to get a new security it would be bad to the extent for which the prisoner has been discharged." So in *Sheerman* v. *Thompson* (4), where a bill of exchange was accepted by the Defendant for a sum consisting partly of a debt from which he had been discharged

(1) 2 W. Bl. 723.
(2) 13 Price, 667.
(3) 5 Dowl. 13.
(4) 11 A. & E. 1027.

under the *Insolvent Debtors Act* (7 Geo. 4, c. 57) and partly of a new debt, a plea of discharge under sect. 61 of the Act was allowed as to the old debt, though it was held to be no answer to the whole of the debt. The same principle was acted upon in *Mare* v. *Sandford* (1) and in *Evans* v. *Williams* (2).

Insolvency is different from bankruptcy, for the after-acquired property of an insolvent is liable to be taken to liquidate the debts scheduled in the insolvency; consequently, if any creditor under the insolvency takes for his debt any after-acquired property, he takes property which ought to be applied in liquidation of the subsequent debts and in payment *pari passu* of the creditors under the insolvency. Thus the taking of the bill of sale in this case operated as a fraud upon both sets of creditors.

In *Ex parte Hart* (3) an insolvent, after an adjudication of final discharge, at the expiration of a certain period, was arrested during that period by the creditors. He was remanded under a *capias ad respondendum* issued by virtue of the 85th section of the Act 1 & 2 Vict. c. 110, and thereupon, in order to obtain his release from custody, he executed a warrant of attorney for the debt, and paid a sum of money by way of instalment and another sum for costs of preparing the warrant of attorney, and the Court ordered the warrant of attorney to be set aside and the sum of money so paid to be refunded.

By the 161st section of the *Bankruptcy Act* of 1861, it is enacted that the order of discharge shall upon taking effect discharge the bankrupt from all debts, claims, and demands proveable under his bankruptcy, and the 166th and 167th sections provide for avoiding contracts made for the payment of debts barred by bankruptcy, and securities given to induce the forbearance of creditors pending proceedings in bankruptcy. This Act was repealed by the *Bankruptcy Repeal Act* of 1869, but not so as to affect proceedings which should have taken place prior to that Act.

If this debt was effectually set aside by the bankruptcy of *Westley*, and could not be revived, then the first portion of the decree of the County Court Judge is right, and the bill of sale could only

(1) 1 Giff. 288. (2) 1 C. & M. 30.
(3) 2 Dow. & Lown. 778.

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stand for the subsequent advance. That bill provides for interest at £5 per cent., and after the payments made there was in fact nothing remaining due for which the Appellant could seize. If so, he was wrongfully in possession, and had no right to pay the landlord any rent, and the decree of the County Court Judge is correct on the second point. He must also be right upon the third point in making the Defendant in the plaint pay the costs.

Mr. *Horsey*, in reply.

SIR R. MALINS, V.C.:—

This transaction appears to have been of an over-reaching character on the part of the Defendant *Harrison*. It seems that the bankrupt *Westley*, in 1865, applied to the Defendant for a loan of £180, which the Defendant advanced him, after deducting £27 by way of discount at the rate of £15 per cent., and thereupon the Defendant imposed upon *Westley* the obligation to pay him the old debt of £200 incurred before his insolvency, as well as the new debt. As security for this sum *Westley* executed the bill of sale dated the 6th of December, 1865. Now this bill of sale provides that interest should be paid at the rate of £5 per cent. instead of £15 per cent., which was the sum charged by the Defendant. In the month of February, 1867, this debt had been reduced by various sums of money paid by *Westley*. The Defendant alleged that there was still due to him a sum of £38, as the balance of the £180, and also the £200 upon the old debt, whereas, if the interest had been reckoned at the rate of £5 per cent., there would have been no more than £9 9*s.* 1*d.* remaining due. Then came the further advance of £100, from which the Defendant deducted the £38 so alleged to be due, and also £15 for a year's interest, so that he only paid *Westley* £47.

Westley afterwards made further payments, which, if the £200 was an invalid debt, and if the interest was to be taken on the footing of the bill of sale, would have wiped off the debt.

Then, in September, 1867, the Defendant, taking his own view of the case, put his bill of sale in force, and entered upon the premises, and seized and sold the furniture for £121 3*s.* Out of the proceeds of this sale the Defendant paid £40 to the landlord of

the premises for rent and expenses, and retained the remainder to satisfy what he alleged to be due to him.

Now, we must ascertain in the first place what the Defendant was entitled to under the bill of sale. Was he entitled to charge £200, the old debt incurred prior to the insolvency? Under no circumstances would he have a right to sue upon this debt, which was extinguished by the insolvency. But can a person avail himself of a security taken subsequently for the purpose of reviving the old debt? If an insolvent were at liberty to pledge after-acquired property, the consequence would be that it would give undue preference to one creditor over another, and the law is clear that in such a case the security taken is void.

Now, what is the true construction under the insolvency? It is true that the statute does not make the debt absolutely void, but it makes it illegal to sue upon such a debt. *Evans* v. *Williams* (1) appears to me to be a clear authority upon the subject, and the judgment of Mr. Justice *Bayley* is very distinct. He says: "The Legislature makes a provision which puts it out of his power to subject himself to the old debt, and makes him not liable upon a new contract for the old debt." Then the case of *Ex parte Hart* (2) has never been questioned, and *Sheerman* v. *Thompson* (3) is also a very important decision upon this point.

The distinction between bankruptcy and insolvency is clear. The insolvent gets only a discharge for his person; his after-acquired property remains liable, after satisfying the demands of subsequent creditors, to be seized under the insolvency, and applied for the equal benefit of all creditors under the insolvency. If, therefore, a creditor under the insolvency were to be allowed to take after-acquired property to secure a scheduled debt, he would defeat the object of the insolvency statutes, by taking to himself alone what those statutes say shall be applied for the benefit of all. This is a fraud upon the Act of Parliament. On these grounds I think the County Court Judge came to a correct conclusion in disallowing the claim.

On the next question, whether the bill of sale was sufficient to cover all the advances made to *Westley*, or only that sum for which

(1) 1 C. & M. 30.
(2) 2 Dow. & Lown. 778.
(3) 11 A. & E. 1027.

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it is expressed to be a security? I think it is a good security only for the sum then advanced, with interest at £5 per cent., and that it is not applicable to any sum which the Defendant advanced subsequently, and for which he thought fit to take a promissory note. On the second point, therefore, I also agree with the County Court Judge.

Under the circumstances the Defendant was a wrongdoer in levying a distress and taking possession of the furniture; and he had no right to pay the landlord the £40 to have the right to take possession.

On all the points, therefore, my opinion is that the Judge was right, and the appeal fails. The Defendant must pay back the whole sum of £121 3*s*., the gross proceeds of the sale; and the appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Needham.*
Solicitor for the Respondent: Mr. *G. S. Warmington.*

V.-C. M. 1872 *April* 27; *May* 4.

In re BRITISH NATION LIFE ASSURANCE ASSOCIATION.

Voluntary Liquidation—Removal of Liquidators—Jurisdiction of Court—Wishes of Shareholders.

12 L.T. 327
330

The Court has jurisdiction under sect. 141 of the *Companies Act*, 1862, to remove liquidators appointed at a meeting of a company at which resolutions for a voluntary liquidation have been passed where no personal unfitness is suggested against them, if it is of opinion that it is for the general benefit of the company that they should be removed; but will be cautious in exercising that jurisdiction where the shareholders are alone interested in the question, and they almost unanimously support liquidators whom they have appointed.

Insurance company *A.* having absorbed several other companies was itself amalgamated with insurance company *B.*, which had also absorbed others. Company *B.* was ordered to be wound up compulsorily, being admitted to be insolvent. Provisional liquidators had been previously appointed, who were subsequently appointed official liquidators under the order. Between the time of the compulsory order being made and their appointment company *A.* passed resolutions for a voluntary winding-up, and appointed other persons liquidators. On an application by the only dissentient share-

holder in company *A.*, supported by the liquidators of company *B.*, to remove the liquidators of company *A.*, and replace them by those of company *B.*:—

Held, that, though the general benefit of company *A.* was a due cause which gave the Court jurisdiction to remove their liquidators, and the Court was of opinion that it was for the benefit of the company that there should be only one set of liquidators for the combined companies, inasmuch as the question was one in which the shareholders alone were interested, the Court would not interfere with their discretion.

Company *B.*, being in the position of an insolvent debtor of company *A.*, was not entitled to be considered.

The Court will not hear individual creditors of a company in opposition to an application by a creditor which is opposed on behalf of the company itself.

In re Marseilles Extension Railway and Land Company (1) considered.

THIS was a summons by Mr. *Henderson*, a contributory of the *British Nation Life Assurance Association*, asking "that *Arthur Cooper* and *George Whiffin*, the liquidators acting in the matter of the voluntary winding-up of the company, may be removed from their office as such liquidators, and in their place and stead *Charles John Bunyon*, *William Pollard Patteson*, and *Stephen Philpot Low*, or some or one of them, may be appointed to act as liquidators in the winding up the affairs of the company."

The *British Nation Life Assurance Association* had previously to 1865 for some time carried on business, and had during that time absorbed and taken over the business of twenty-six other insurance companies. By a deed dated the 16th of March, 1865, the *British Nation Association* was amalgamated with and absorbed into the *European Life Assurance Society*, which had itself previously absorbed twelve other insurance societies. The result of the amalgamation was that the whole of the business of the association was for the future carried on by the society, and all the books and papers were transferred to them. As in similar cases of amalgamation novation had, in some instances, taken place, while in other cases the association was still liable. The association had, under the deed of the 16th of March, 1865, an indemnity from the society against any claims upon them, but in the events which had since happened this indemnity was practically worthless.

During the year 1871, petitions had been presented for winding up the *European Assurance Society* on the ground of insolvency,

(1) Law Rep. 4 Eq. 692.

V.-C. M. 1872 *In re* British Nation Life Assurance Association.

and on the 17th of November, 1871, the present liquidators of the society were appointed provisional liquidators, and the petitions were ordered to stand over pending certain negotiations for its reconstruction or the transfer of its business to some other company as a going concern. These negotiations, however, came to nothing, and on the petitions coming on to be heard again on the 12th of January, the usual order was made to wind up the society compulsorily. While these petitions were pending a bill was prepared for presentation to Parliament for conducting the liquidation by arbitration in a way similar to that in which the *Albert Insurance Company* had been wound up, and Messrs. *Mercer & Mercer*, who were solicitors for certain parties appearing on the petitions for winding up the society, were engaged in the preparation of that bill. A meeting of the *British Nation Association* was called for the 18th of January, 1872. Out of about 350 shareholders, representing 27,000 shares, thirty, representing about 10,000 shares, attended. The meeting was duly held, and extraordinary resolutions were unanimously passed for a voluntary winding-up, and for appointing Messrs. *Cooper* and *Whiffin* liquidators. Mr. *Henderson*, the only dissentient shareholder, spoke at the meeting in opposition to the resolutions, but did not venture upon a division. On the 8th of February, 1872, by an order in Chambers, Messrs. *Bunyon*, *Patteson*, and *Low*, then the provisional liquidators, were appointed liquidators of the society under the compulsory order.

The liquidators of the society were now prosecuting a bill in Parliament for winding up the society by arbitration, which differed in some respects from the bill prepared by Messrs. *Mercer & Mercer*, who, as the solicitors to the association, were now endeavouring to obtain the introduction into it of such amendments as would assimilate it to their own bill.

In the affidavits in support of the summons it was stated that great inconvenience would arise from having two sets of liquidators, who would both require access by themselves and their clerks to the books of the society, and in particular they instanced one class of insurances called the industrial business, in which no policies were given, and the facts as to which could only be ascertained by searching the books. But in answer to this it was stated on behalf of the association that the class of business in question was

very limited in extent, and that claims arising out of it could be easily ascertained from the pass books given to the persons contracting for such insurances.

It further appeared that while the society was in a hopelessly insolvent condition, and would not be able to pay more than a small dividend, the association was solvent, or nearly so, in respect of claims for which it was primarily liable.

It was not concealed that the present application was strongly supported by the *European Society*, and that the interests of Mr. *Henderson* were quite as much on the side of that society as of the *British Nation Association*.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Pearson*, Q.C., and Mr. *G. Murray*, in support of the summons:—

The two sections of the *Companies Act* under which the Court has power to remove liquidators are the 141st and the 150th, and a voluntary winding-up under the supervision of the Court is for this purpose on exactly the same footing as a winding-up under a compulsory order, the Court having, by sect. 93, in the former case all the powers which it might exercise under a compulsory order. Under the 141st section the Court has power to remove liquidators appointed by the company "on due cause shewn;" but under the 150th it has absolute power of removal of liquidators appointed by itself. The Court has consequently power, by the united operation of this section and sect. 93, to remove voluntary liquidators. But if the removal can only be effected under sect. 141, the question as to what constitutes due cause, has already come before the Court, and it has been held in *In re Marseilles Extension Railway and Land Company* (1) that the Court may remove a liquidator appointed by a company without any misconduct being alleged against him, if it appears on the whole that it is for the benefit of the company that he should be removed. Therefore the question is, whether it is on the whole for the benefit of the company, that is, the *British Nation Association*, that there should be two sets of liquidators or only one, and as regards this there can hardly be any doubt. The whole of the business has been transferred, and the books of the association assigned to the

(1) Law Rep. 4 Eq. 692.

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European Society, and they are now in the possession of the liquidators, and there will be enormous costs occasioned if a separate winding-up is continued. The only cases of conflicting interests could be that of annuities, and it would be easy to direct that in case of conflict the companies should be separately represented, as was explained in *In re Western Life Assurance Society* (1). In fact every one of the remarks made by the Lord Justice *Giffard* in that case apply now, and shew the propriety of appointing at least one of the liquidators of the *European Society* to wind up the *British Nation Association*. It does not appear even that there are any insurances in respect of which novation has not taken place, and in respect of which the *British Nation* has any separate existence.

Sir *Roundell Palmer*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Millar*, for the *British Nation Association* :—

This is an application, nominally by a shareholder of the *British Nation Association*, but really, by the *European Society*, which is in the position of a debtor admitted to be insolvent. *In re Marseilles Extension Railway and Land Company* (2) was a case of personal objection to liquidators on the part of creditors, and in *In re Western Life Assurance Society* it was assumed, erroneously, as it afterwards turned out, that there was an unlimited liability on the part of the shareholders in the *Albert Society* with respect to the guarantees.

The Court has no jurisdiction to remove the liquidators appointed by the company without due cause shewn, and whatever amounts to due cause, it is clearly not merely the discretion of the Court, or the wish of the debtor. The only jurisdiction arises from the Court being put in motion by Mr. *Henderson*, the one dissentient shareholder at the meeting, and the Court cannot interfere with the discretion exercised by shareholders in general meetings except upon some very clear ground : *In re London and Mercantile Discount Company* (3) ; *Ex parte Pulbrook* (4). In the latter case the application was by a creditor under sect. 147 of the *Companies Act*. The Court must act upon the principle that the interest of the

(1) Law Rep. 5 Ch. 396.
(2) Ibid. 4 Eq. 692.
(3) Law Rep. 1 Eq. 277.
(4) 2 D. J. & S. 348.

company to be wound up is alone to be considered, and will be disposed to leave it to the shareholders to decide who shall conduct the liquidation: *In re London Quays and Warehouses Company* (1); and will not, without some definite cause, interfere with an appointment of liquidators.

Mr. *Higgins*, Q.C., and Mr. *Graham Hastings*, appeared for some creditors of the *British Nation Association* in support of the summons, but the Court declined to hear them.

Mr. *Pearson*, in reply:—

It is simply a matter of discretion for the Court whether any sufficient reason exists for a separate winding-up, and it may give effect to its determination by removing a voluntary liquidator for the purpose of simplifying the winding-up.

SIR R. MALINS, V.C.:—

This is a case as to which my mind has undergone considerable modifications, or even changes of opinion, during the course of the argument which commenced this day week, and I feel now, that I am called upon to decide a very difficult question of jurisdiction and discretion.

The application is by Mr *Henderson*, a single shareholder in the *British Nation Association*, to remove the liquidators appointed at the meeting which passed a resolution to wind up the association voluntarily; and to substitute for them the liquidators of the *European Assurance Society*. The *British Nation Association* was established many years ago, but in the year 1865 amalgamated with the *European Society*, which has lately terminated so disastrously, but was at that time regarded as a solvent and sound concern; and the *European* having taken upon itself all the liabilities of the *British Nation*, the shareholders of the latter, therefore, are entitled to look to the *European* to fulfil that obligation; but it is perfectly plain that they can receive only a very small dividend upon their claim.

When it appeared that the shareholders in the *British Nation* were, as a separate company, liable to their creditors, a meeting

(1) Law Rep. 3 Ch. 394.

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was duly called, and held on the 18th of January last, at which the usual resolutions to wind up voluntarily were passed, and Messrs. *Cooper* and *Whiffin* were appointed liquidators. Though I had on the 12th of January, six days previously, made an order to wind up the *European* compulsorily, no liquidators had been then appointed for that society, and it was only on the 8th of February that I appointed Messrs. *Bunyon*, *Patteson*, and *Low* to the office. That the affairs of the two companies are most intimately connected no one can for a moment doubt, every book and paper belonging to the *British Nation* being, on the occasion of the amalgamation, handed over to the *European*, in whose possession they have been ever since, and whose property I must consider them to be.

Now, this application is founded upon the consideration that it is very inconvenient to have two sets of liquidators, the one to wind up the *British Nation Association* and the companies connected with it, the other to wind up the *European Society*, into which they all at last merged, and I am perfectly satisfied that there will be great inconvenience in that course, and am unable to see that any great benefit can arise from it.

The first question is, whether I have jurisdiction to do what I am asked. This being a voluntary winding-up, the answer mainly depends upon the construction of the 141st section of the *Companies Act*, for the case of a compulsory winding-up, where the appointment of the liquidator rests with the Court, has been already decided in the winding-up of the *Albert Company*, which had also absorbed many other companies, in the case of *In re Western Life Assurance Society* (1). The question being between the nominees of the *Western Assurance Society*, and those who were already liquidators of the *Albert Company*, and this Court having the power to exercise its discretion, I find that the Lord Justice *Giffard*, after stating (2) that the Vice-Chancellor, after a full discussion, had decided that it was best to appoint one of the liquidators of the *Albert Company* to be liquidator of the *Western Society*, and had said that if any question of law arose on which the interests of the *Albert Company* and the *Western Society* were conflicting, a separate solicitor could be appointed to act for the *Western Society*, and that,

(1) Law Rep. 5 Ch. 396. (2) Law Rep. 5 Ch. 399.

having regard to the way in which the affairs of the two companies were mixed up, there would be a great saving of time and expense in having a common liquidator to do all matters which the liquidator had to do independently of legal proceedings, expressed his entire concurrence with that view, and affirmed it in every way, saying that he thought there would be a ground for great and grave dissatisfaction if any other course had been adopted. In one of the other companies absorbed by the *European*, containing, like the *British Nation*, a perfectly solvent body of shareholders, and stating that they would pay every one in ten months, I have also made an order to wind up compulsorily, and the appointment of the liquidator necessarily came before me in Chambers. Two gentlemen of great distinction, Sir *George Pollock* and Sir *Frederick Smith*, to whose opinions I was very much inclined to defer if I had felt myself at liberty to do so, proposed Mr. *Wilbraham Taylor*, a gentleman of ability and knowledge of business, engaged in the public service, who would have wound up that company perfectly well. But I felt myself bound by *In re Western Life Assurance Society* (1), and followed it by appointing one of the liquidators of the *European* to be liquidator of that company; but I then thought, and still think, that independently of authority, that was the right course, on account of the great inconvenience which would arise from having a number of separate liquidators mixed up with these affairs. Everybody must see what the consequences would be of having separate sets of liquidators of each of the thirty-nine companies going about the same offices, looking over the same books, searching through the same papers, and substantially engaged about the same business. Therefore, if this had been a compulsory winding-up my duty would have simply been to follow that case. This, however, is a voluntary winding-up, and Sir *Roundell Palmer* and Mr. *Glasse* have called my attention to that fact and its consequences.

Now I am told that at the meeting on the 18th of January thirty of the shareholders, representing 10,000 shares out of 27,000, attended—a number which fell far short of the whole body; but I agree that I must consider those as assenting who do not dissent, and those who do not attend as leaving it to those who do to settle

(1) Law Rep. 5 Ch. 396.

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the business; and I understand there was no division, but all agreed that there should be a voluntary liquidation under Messrs. *Cooper* and *Whiffin;* and though Mr. *Henderson* seems to have taken a different view, there was no division, and I must consider these two gentlemen to have been unanimously appointed liquidators. It is true liquidators of the *European* had not then been appointed, but the present official liquidators were acting as provisional liquidators, and I do not believe much doubt was entertained with regard to my intentions respecting them.

Now if the *European* had been able to perform their part of their contract with the *British Nation*, which was to discharge all their obligations, the *British Nation* would never have had any further separate existence. Yet, according to the laws of this Court, when they failed to do so the *British Nation* revived, and became liable to be wound up.

Consequently, I must treat them as an independent company. Now the first question is, whether I have the power to remove these liquidators. I have heard much argument upon the subject, but I still adhere to the interpretation which I put upon the Act in *In re Marseilles Extension Railway and Land Company* (1). It is very difficult to say what the intention of the Legislature was in providing that due cause must be shewn for the removal of a voluntary liquidator. Dishonesty or misconduct of any description would without doubt be "due cause;" but that is not the present case. I am perfectly satisfied that these gentlemen would have wound up all these companies entirely to my satisfaction. But in *In re Marseilles Extension Railway and Land Company* I came to the conclusion that "due cause" had not so limited an interpretation, and I am not aware that my decision has ever been questioned —at all events, I entirely adhere to it now. I then said (2): "The question is, what is meant by the words 'on due cause shewn.' On one side it is contended that 'due cause' must be something amounting to misconduct or personal unfitness; on the other side it is contended, and I think that the contention is borne out by the case of *Ex parte Pulbrook* (3), that the Court may take all the circumstances into consideration, and if it finds that it is,

(1) Law Rep. 4 Eq. 692. (2) Law Rep. 4 Eq. 694.
(3) 2 D. J. & S. 348.

upon the whole, desirable that a liquidator should be removed, it may remove him. I do not feel much doubt that the latter is the true construction, and that I have the power to remove these gentlemen." I then likened the case to that of the power of the Commissioner over assignees in bankruptcy. My opinion is still that I have the power, and that it is a due cause shewn if it appears to the Court upon the whole desirable that the removal should take place; or, in other words, that the winding-up is likely to go on more advantageously upon the removal of the liquidators appointed than it would by their retention. I am therefore of opinion that I have the power.

But in that case, although I decided that I had the power, I came, after consideration, to the conclusion that it was not expedient I should exercise it. I have, therefore, now to consider the same question and, in order to do that, I must look at all the surrounding circumstances; and I find that, as far as I know, the great body of persons interested in the affairs of this company still adhere to their resolution that the company should be wound up by the liquidators they have appointed. I did not think it necessary to hear Mr. *Higgins*. It is settled as the rule, that when the application is to wind up a company any creditor or shareholder may appear to support or object; but I think that the rule does not hold in the case of every application made in the winding-up. If in a common administration suit every creditor were allowed to be heard the business would never be done, and therefore individual creditors have no right to attend in Chambers, although they are most interested in the mode in which the accounts are taken. They often apply for liberty to attend, and sometimes it is given on the condition of paying the costs, and sometimes of paying their own costs, but it is more frequently refused altogether. So here all the creditors and shareholders are represented by the liquidators, and are not entitled to appear by separate counsel.

Then as to the expediency, it is a strong circumstance that there is only one shareholder who appears to desire to change the management of the liquidation; and I thought it was a ground for not hearing Mr. *Higgins* that nobody has appeared to support Mr. *Henderson*. I can only look upon the application as that of one shareholder against the wishes of all the others.

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I must also take into consideration the fact that there is a contention going on in Parliament, to which I cannot close my eyes, with respect to the arbitration bill which, though not exactly promoted by the liquidators of the *British Nation*, is more strongly supported by them than by the liquidators of the *European*, in whose charge it is. If I acceded to this application I should be virtually handing over the whole of that question to the liquidators of the *European*. If I acted upon my own judgment as to what was best I should certainly have no hesitation in deciding that in all cases of amalgamated companies I should have one liquidator or one set of liquidators only. I am very much disposed to think that the wisest course in the interest of all parties would be to have one set of liquidators only; and if I thought that in the companies yet to be wound up there were any danger of the shareholders resolving to wind up voluntarily and appointing a fresh set of liquidators, I should certainly put a stop to it. In coming to my present conclusion I desire to be understood as in no way sanctioning the idea that in any similar case I should not exercise the power which I am clearly of opinion I possess; but, looking at all the surrounding circumstances, I consider the best course to be, not to accede to this application. Therefore, for the present at all events, without precluding any fresh application on other grounds, I think Messrs. *Cooper* and *Whiffin* must remain voluntary liquidators under the supervision of the Court.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Mercer & Mercer;* Messrs. *G. L. P. Eyre & Co.*

TALBOT *v.* EARL OF SHREWSBURY.

V.-C. M. 1872 May 25.

[1868 T. 88.]

Ejectment—Mesne Profits—Action against Executor—Money had and received —Proof of wrongful possession by Testator.

Earls *A.*, *B.*, and *C.*, being successive tenants in tail of property held under an inalienable Parliamentary title, and *B.* having, after the death of *A.*, entered into possession of the entailed estates, and, together with them, of certain leaseholds formerly in the possession of *A.*, the executors of *A.* brought an action of ejectment against *B.* to recover possession of the leaseholds as part of *A.'s* estate. *B.* having died before trial of the action, another action was brought against *C.*, the successor in title. *C.*, who was also executor of *B.*, compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that £4000 should be allowed as a debt from *B.'s* estate in respect of rents received by *B.* Before the compromise a creditor's suit was instituted and a decree made for the administration of *B.'s* estate, which was insolvent. On a summons by *A.'s* executors to prove against *B.'s* estate for the amount of the rents actually received by him :—

Held, that the judgment given in the action against *C.* was not evidence of wrongful possession by *B.*, which could serve as a foundation for the claim, and that the admission by the executor as to mesne profits in the compromise was inoperative, being made after the decree.

THIS was an adjourned summons in a suit instituted on behalf of the creditors of *Henry John*, eighteenth Earl of *Shrewsbury*, for the administration of his estate, which proved to be insolvent.

The summons was taken out by the executors of Earls *John* and *Bertram Arthur*, who were respectively the sixteenth and seventeenth Earls, for leave to prove as creditors against the estate of Earl *Henry John* for the amount of the rents received by him of certain leasehold property at *Broadstone*, in the county of *Oxford*, held for terms of years renewed from time to time under the Principal and Scholars of *Brazenose College, Oxford*.

In the year 1858 Earl *Henry John* established his right to the title and dignity of Earl of *Shrewsbury*, and to the estates entailed under a Parliamentary inalienable title so as always to go along with the title. At the same time he entered into possession of these estates and, together with them, of the *Broadstone* leaseholds, which had been held by many successive Earls of *Shrewsbury*, and

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were believed to form part of the settled estates, and he received the rents of the leaseholds from that time till his death, which happened on the 4th of June, 1868. During the lifetime of Earl *Henry John*, a question was raised by the executors of Earls *John* and *Bertram Arthur*, as to whether the *Broadstone* leaseholds really formed part of the settled estates, the executors of Earl *John* claiming them as part of his estate, and the executors of Earl *Bertram Arthur* claiming to have at least a lien upon them for a sum of £942 19*s.* 8*d.*, which consisted partly of a fine on renewal and partly of an expenditure for repairs.

On the 14th of May, 1867, the executors of Earls *John* and *Bertram Arthur* commenced an action of ejectment against Earl *Henry John* to recover possession of the *Broadstone* leaseholds. But the action had not been tried when Earl *Henry John* died, having appointed the present Earl and Captain *Carpenter* his executors. The present Earl alone proved the will.

On the 9th of September, 1868, the executors of Earls *John* and *Bertram* commenced a fresh action of ejectment in respect of the *Broadstone* leaseholds against the present Earl, and by a subsequent arrangement a special case was stated for the opinion of the Court of Common Pleas to determine the question at issue. Before the special case had been heard an arrangement was effected by certain articles of agreement, dated the 24th of August, 1870, and made between the executors of Earl *John* of the first part, the executors of Earl *Bertram Arthur* of the second part, the present Earl as executor of Earl *Henry John* of the third part, and in his own right of the fourth part, whereby, after reciting the above stated facts and the institution of the present suit, it was, amongst other things agreed that judgment should be entered up on the special case in favour of Earl *John* with costs, that the present Earl should purchase the same property from the executors of Earl *John* at a price mentioned in the agreement; and it was further provided as follows: "The amount of the rents and profits of the said *Broadstone Farm* received by the said *Henry John* eighteenth Earl of *Shrewsbury* in his lifetime and for which his personal estate is now liable is hereby agreed to be the sum of £4000 and the sum of £4000 shall be allowed and certified in the administration of the estate of the said *Henry John* Earl of

Shrewsbury in the suit of *Talbot* v. *Earl of Shrewsbury* as a debt due from him the said late Earl *Henry John* to the said *Charles Robert Scott Scott Murray* and *Ambrose Lisle Phillipps de Lisle* (the executors of Earl *John*) in respect of the rents of the said *Broadstone Farm* received by the said Earl *Henry John* in his lifetime and applied to his own use and the said *Charles Robert Scott Scott Murray* and *Ambrose Lisle Phillipps de Lisle* shall be entitled to the said sum of £4000 or any dividend payable in respect of the same upon the execution of the conveyance or assignment of the said *Broadstone Farm* to the said *Charles John* Earl of *Shrewsbury*." The suit was instituted and the decree made before the compromise of the special case.

By some inadvertence the Plaintiff in the suit was not made a party to the agreement or informed of its existence, but the articles of agreement were carried into effect by the parties to them. The summons sought to make the estate of Earl *Henry John* liable for the amount treated as due by the articles of agreement.

Mr. *Bovill*, Q.C., and Mr. *A. L. Smith*, of the Common Law Bar, in support of the summons:—

Where a man dies liable to an action for mesne profits for rents of property to which he is not entitled, though it is an action founded in tort, an action for money had and received will lie against his personal representative for what has been actually received by him, or a bill may be maintained for an account of what has been so received: *Caton* v. *Coles* (1); *Pulteney* v. *Warren* (2); so also for goods improperly received by the testator: *Hambly* v. *Trott* (3), or for the produce of ore or timber or the like: *Powell* v. *Rees* (4); *Bishop of Winchester* v. *Knight* (5).

Here the judgment entered up against the present Earl is sufficient evidence that the late Earl was a trespasser in respect to the leaseholds to give a right of action against the executor of the late Earl for money had and received; and consequently, the estate being under administration, to prove against it in the suit.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the present Earl, and

(1) Law Rep. 1 Eq. 581. (3) 1 Cowp. 371.
(2) 6 Ves. 72. (4) 1 P. Wms. 406.
(5) 7 A. & E. 426.

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Mr. *Bristowe*, Q.C., and Mr. *Everitt*, for Captain *Carpenter*, took no part in the arguments.

Mr. *Cotton*, Q.C., and Mr. *Davey*, for the Plaintiff, were not called upon.

SIR R. MALINS, V.C.:—

This is a claim by the representatives of the sixteenth and seventeenth Earls of *Shrewsbury* against the estate of the eighteenth Earl, to recover the amounts of rents received by him in respect of property of which it is contended that he improperly possessed himself.

To decide this question an action of ejectment was commenced against him in the year 1867, but he died before it was determined. A new action was then commenced against the present Earl, but it was not brought to trial. It was turned into a special case, but before it was heard a compromise was come to by which the present Earl paid a certain price for remaining in possession of the property, and a sum was agreed upon as the amount which would have been due for mesne profits.

Now if a judgment had been obtained against the late Earl in the action of ejectment, he would have been liable to pay over the rents received by him as mesne profits. It is said that though an action for mesne profits is an action of tort, still where a man dies liable to such an action there is a right of action against his executors for money had and received for so much of the rents as have actually been received by him in his lifetime. But the difficulty here is, that there has been no judgment obtained against the late Earl shewing him to have been wrongfully in possession of this property, which would have given a right of action against him for mesne profits. If the action against the present Earl had resulted in a verdict against him, shewing that the late Earl must have been in wrongful possession, that might have been a sufficient foundation for this claim. But I cannot treat a wrongful possession as established against the late Earl because the present Earl has thought fit, as the basis of a compromise of an action, to admit wrongful possession against himself.

I am therefore of opinion that the Plaintiff has failed in his very

first step, which is that of proving that the late Earl wrongfully received the rents. There is further no admission of liability, for the present Earl could not make an admission as executor which would bind his predecessor's estate after a decree in the administration suit; and he very properly takes no part on the present question. The only other persons are the legatees, who have no interest in question, the estate being insolvent, and the Plaintiff, who of course cannot give an admission.

There is therefore neither evidence nor admission that the late Earl had any wrongful possession of this property, and on these grounds the summons fails. The claim will, therefore, be refused, and the costs of all parties except the claimants will be out of the estate.

Solicitors: Messrs. *Young & Jackson;* Messrs. *Parkin & Pagden;* Messrs. *Austin, De Gex, & Harding;* Messrs. *Farrer, Ouvry, & Co.*

In re GENERAL PROVIDENT ASSURANCE COMPANY. *Ex parte* NATIONAL BANK.

Deposit of Securities for Bills under discount—Prescribed Form of Mortgage by a Company—Bankers' Lien.

A company deposited title deeds with a bank "as collateral security for bills under discount." At the time the company was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, and the securities realised more than was sufficient to cover the latter bills:—

Held, that the company could effect a mortgage by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mortgage deeds; that the bankers were not in the position of officers of the company, who were bound to see that the required formalities were complied with, and that the bank was entitled to hold the balance of the proceeds upon the sale of the securities, to meet the whole amount due to them by the company.

THIS was a claim by the *National Bank* to prove under the winding-up of the *General Provident Assurance Company* for the sum of £2349 1*s.* 10*d.*, under the circumstances stated below:—

The 69th clause of the articles of association of the company

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was as follows: "All policies, deeds, mortgages, charges, debentures, bonds, and other securities made and executed on behalf of the company may be made in such form and contain such powers (including powers of sale), provisions, conditions, covenants, clauses, and agreements as the directors shall think fit, and in addition to being sealed with the seal of the company, shall be signed by two directors and countersigned by the secretary or actuary; and when so sealed, signed, and countersigned, shall be valid securities, and conclusive and enforcible against the company, without the necessity of proving any other matter than their being executed in manner hereby prescribed."

In the year 1865 the assurance company purchased from the *General Exchange Bank* certain mortgage securities affecting various properties, which were divided into groups numbered from 1 to 27, each representing a certain sum, for each of which a bond was given payable on a specified day. The company having paid Bond No. 1, consisting of some Irish properties, applied to the *National Bank* (*Camden Town Branch*) to advance them money upon deposit of the title deeds of these estates comprised in Bond 1. The bank acceded to the application, and on the 13th of December, 1866, the following resolution was passed by the board of directors of the assurance company: "Resolved that the mortgage securities represented by Bond No. 1 should be lodged with the *National Bank, Camden Town*, as collateral security for bills under discount."

In pursuance of this resolution and arrangement certain bills were discounted by the bank, but at the date of the winding-up, which took place on the 6th of June, 1868, there was only one bill, for £500, remaining in the hands of the bank which had been actually discounted for the assurance company, but against which the liquidator now claimed credit for £400 received from the *Etna Assurance Company*.

It appeared that Mr. *Heywood*, who was the general manager of the *General Provident Company*, kept a private account with this bank, and was also in the habit of having bills discounted for his own purposes, and at the date of the stoppage of the company such account was overdrawn by a considerable sum, to secure which he had deposited with the bank certain bills of the company, but which

were not discounted for the company. A Mr. *Horner*, another director, had also a private account at the bank, and this account being overdrawn he deposited with them a bond for £1000 of the company. Another bill for £500 was also discounted for a gentleman connected with the company, but not for the company.

The properties in Group and Bond 1 had been realized since the winding-up order by an arrangement under which the proceeds were to follow the rights to the property, and produced about £900, and it now became necessary to decide the rights of the parties to the proceeds.

The bank claimed to have a general lien on the entire proceeds, according to the usual custom of bankers, and also that the company could not pay off any part of the debt without paying the whole. The liquidator, on the other hand, denied that the bank had any lien beyond what might be due on any bill actually discounted for the company, and that they had no lien for any other moneys due by the company on other accounts, though they might be general creditors in respect of *Heywood* and *Holmes's* debts, as collateral security for which they held obligations of the company.

Mr. *Graham Hastings*, in support of the claim :—

We submit that the deposit of title deeds by the assurance company was intended to secure all bills which might be accepted by the company, whether discounted for the company themselves or for any person on their behalf. This was virtually recently decided by your Honour in the case of *In re European Bank, Agra Bank Claim* (1), upon the general principle of mercantile law, that a banker has a lien, in the absence of any special contract, on securities deposited by a customer for a specific purpose, for the customer's general balance, any balance therefore due to the bank by the assurance company would fall within this rule. The same principle was applied to the case of mortgagees (who were not bankers) in *In re Haselfoot's Estate* (2) and *Spalding* v. *Thompson* (3).

(1) Since affirmed on appeal, Nov. 8, 1872. W.N. (1872) 194

(2) Law Rep. 13 Eq. 327.

(3) 26 Beav. 637.

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We admit that the precise amount for which the security was at first given by the company has been covered, but we say that we are entitled to hold the balance for which the property was sold to meet other bills drawn on behalf of the company, and constituting the general balance due to the bank.

Mr. *Higgins*, Q.C., for the Official Liquidator of the *General Provident Assurance Company*:—

It is admitted that the only bill discounted specifically for this company was one of £500, and that has been, we say, covered by a sum paid by the *Etna Insurance Company;* but under any circumstances, bills drawn by other persons, and not discounted for the company, cannot be brought within the resolution of the board, which provided that the property should be a collateral security for bills under discount.

We contend, however, that the mortgage was altogether invalid, since the provisions of the articles binding the board of directors were not complied with. It is expressly declared, by the 69th clause, that all mortgages executed on behalf of the company shall be made in a particular form, and shall be sealed with the seal of the company, and signed by two directors, and countersigned by the secretary or actuary. These directions were not complied with, neither was the mortgage registered under the 43rd section of the *Companies Act*, 1862, consequently this mortgage by deposit of title deeds cannot be supported. This principle was established in *In re Wynn Hall Coal Company* (1), where it was held that the omission to register a mortgage prevented its being set up against the general creditors of the company. *In re General Provident Assurance Company*, before your Honour, on Feb. 20, 1869, was a decision to the same effect, that a company could not bind itself under its borrowing powers unless the forms prescribed had been complied with. It was also held, in *In re Patent Bread Company* (2), that the solicitor of the company could not avail himself of a charge when it had not been registered under the 43rd section of the *Companies Act*, 1862, as it was his duty to see that the prescribed forms were carried out.

(1) Law Rep. 10 Eq. 515. (2) Law Rep. 7 Ch. 289.

Mr *Graham Hastings*, in reply:—

The authorities cited to shew that this is not a valid mortgage do not affect the circumstances of this case. They were all decisions that a solicitor or other officer of the company could not avail himself of a charge when the formalities required upon a mortgage effected by a company had not been complied with, and when it was the duty of the officer of the company to see such forms carried out. A banker is not an officer of the company, as your Honour decided in *In re Imperial Land Company of Marseilles* (1), and is not bound, therefore, to see that the forms prescribed in the articles are adhered to. On the other hand, it was decided in *Re Athenæum Life Assurance Society* (2) that it is not necessary to comply strictly with the forms laid down for effecting a mortgage. In the *Patent File Company's Case* (3) Lord Justice *Mellish* said that a company had power to mortgage unless expressly prohibited from doing so, and he decided that the required ceremonies might be dispensed with.

This mortgage is therefore valid, and is a good security for all the bills due by the company to the bank.

Sir R. Malins, V.C.:—

This case seems to involve points of considerable nicety, and it is very difficult to form a satisfactory conclusion upon them. The transaction is this: The *General Provident Assurance Society* was a very small and a very unsuccessful company. Its affairs have never been brought before me without producing the greatest dissatisfaction in my mind that such a company could possibly exist. It is a company which induced very small labouring people, and very poor people in different parts of the country, to effect policies on their lives, and other matters of that kind, which only ended in miserable disappointment. I am sorry to say, its business was conducted in the most irregular and improper manner. I think that the transaction now before me is one which is not altogether a proper one, but I must take the law as I find it decided, and apply it, as best I can, to meet such a case.

(1) Law Rep. 10 Eq. 298. (2) 4 K. & J. 549, 562.
(3) Law Rep. 6 Ch. 83.

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Now it seems that this company's banking accounts, like all other proceedings connected with it, were conducted in a very irregular manner. The business was carried on in the *Strand*, and it certainly appears very unsatisfactory that under such circumstances they should have gone to *Camden Town* with their banking account, when there were plenty of bankers about the *Strand* and in the *City of London*. The principal seat of the *National Bank* itself is in the very heart of the city; but whether it was that they found the manager of the bank at *Camden Town* more facile in their dealings with him than the manager of the head branch, or whatever reason they had I know not, but with that branch they conducted their business. The circumstance of wanting bills to be discounted, which such a company as this ought never to want, should have excited suspicion on the part of their bankers; but they did want it, and accordingly passed a resolution at a board meeting, which was held on the 13th of December, 1866, "That the mortgage securities represented by Bond No. 1 should be lodged with the *National Bank* at *Camden Town* as collateral security for bills under discount."

The first point which was made by Mr. *Graham Hastings*, on the part of the *National Bank*, was, that this was a deposit to secure all bills which were accepted by this society, whether discounted for the society itself, or for any totally indifferent person. From that argument I dissent; and my opinion is, that the true meaning of the resolution is, not that the securities were to be held for every bill that might come by any means whatever into the possession of the *National Bank*, which was accepted by the society, but that it was intended to be a collateral security for bills under discount for the *General Provident Company*, and no other. Although it does not say that, it is clearly implied. I am, therefore, unable to come to the conclusion that they were entitled, by the mere memorandum, to hold the balance in their hands, after satisfying the bills actually discounted by the company, as against any debts or bills discounted by them for other parties.

The objection made by Mr. *Higgins* on behalf of the society is, that the mortgage is altogether invalid, because the 69th clause of the articles of association provides that all mortgages must be executed with certain ceremonies. It does not say that when not so

executed they shall not be a good security, but I think that is necessarily implied, because it says "when so sealed, signed, and countersigned they shall be valid securities, and conclusive upon the company." I think myself that it would have been very well indeed if the Courts had resolved never to give effect to any mortgage by these companies, by deposit of title deeds or otherwise, unless those requisites had been first complied with, because it is a great safeguard to shareholders that these ceremonies should be gone through; it would be a great restraint on careless or fraudulent directors and officers of the company that they could not create a mortgage upon the property of the company without going through all such ceremonies as these which are prescribed here. Accordingly that point was early brought to my attention in a case of *In re General Provident Assurance Company*, of which there is a note in the *Weekly Notes* of 1869, page 58, in which Messrs. *Brandon*, the solicitors of this very company, had obtained a mortgage as to which the ceremonies had not been complied with, and I am there reported to have said: "That although it was not disputed that the money was advanced, the company could not bind itself under its borrowing powers unless the forms prescribed had been complied with. In this case this had not been done, and therefore he could not give the direction asked, that Messrs. *Brandon* be let into possession of the property. That decision did not interfere with the title deeds which were in Messrs. *Brandon's* possession. The claim must be disallowed with costs"—that is to say, I did not interfere and take the title deeds away from them. It does not appear there that they received them on the ground of their being officers of the company, but I am pretty positive they did so, and that my decision in fact turned upon that point; but inasmuch as they were solicitors of the company, it being a duty imposed on them to see that all mortgages were in compliance with the rules, and having taken the mortgage without it, I thought the mortgage was altogether invalid. However, I should not have hesitated at that time to decide the general point that every mortgage of a joint stock company in which these requisites are not complied with according to the articles of association should be held to be invalid. I think it would be as well if it were so decided. But I find that has not been so.

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The case of *In re Athenæum Life Assurance Society* (1), decided by the present Lord Chancellor when Vice-Chancellor, breaks in upon that principle, and says it is not necessary to comply with all these ceremonies; and that certainly was so stated in *In re Patent File Company* (2), which is a decision of Lord Justice *Mellish*. In giving the judgment (3) he distinctly says this: "The third objection is the only one that could raise any serious doubt, namely, whether a joint stock company of this kind can raise money or give security for a past debt by deposit of title deeds. It was argued that no company can mortgage unless expressly authorized to do so. Now the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so. The 43rd section of the Act appears to recognise the creation of mortgages as an ordinary incident to a company. The memorandum in the present case mentions as a purpose of the company the disposing of its landed property." That therefore gives a sanction to their mortgaging without complying with those ceremonies.

Again in the case of *In re Patent Bread Machinery Company* (4), a solicitor not usually employed in the company was employed by them to act in a particular matter, and having required security for costs, they gave him a charge on certain debts due to them. About five weeks after this a winding-up petition was presented, on which an order was shortly afterwards made. The charge had not been registered. It was there held, affirming the decision of the Master of the Rolls, that though under the *Companies Act*, 1862, sect. 43, the want of registration did not make the charge void, yet that the solicitor could not avail himself of the charge, for that it was his duty, as being the solicitor of the company in this transaction, to see that the directions of the Legislature as to registration were obeyed. Lord Justice *James* says (5): "I am of opinion that the judgment of the Master of the Rolls must be affirmed. I agree with the argument for the Appellant, that there was power to give such a mortgage as this, and that it is not made void by

(1) 4 K. & J. 549, 562.
(2) Law Rep. 6 Ch. 83.
(3) Law Rep. 6 Ch. 88.
(4) Ibid. 7 Ch. 289.
(5) Law Rep. 7 Ch. 291.

want of registration. But as it is the duty of the officers of the company to see that every charge specifically affecting property of the company is registered, I am of opinion that no director, manager, or other officer of the company can avail himself of a charge which is not registered."

That decision is entirely in accordance with what I decided in *In re Wynn Hall Company* (1), which does not seem to have been cited in the case I have referred to, but it is in entire accordance with it; and that is, that no officer of the company can obtain a security unless registered under the 43rd section, and unless the ceremonies I have mentioned are all complied with. But I have had occasion to consider, and I have already decided the question, whether the banker of a company is its officer. He is mentioned specifically in the 100th section of the Act as a person against whom certain remedies may be had as to production of papers and so on. It was argued before me in the case of the *Imperial Land Company of Marseilles* (2), against this very bank, that because bankers were mentioned amongst the officers of the company, therefore they were officers within the meaning of the 156th section; but I then decided that a banker is not an officer of the company. Consequently, I must treat the bankers as mere indifferent mortgagees. The result, therefore, to which I am obliged to come, is, that the deposit of the title deeds created a valid mortgage although the ceremonies required by the deed of settlement were not complied with, and although there was no registration under the 43rd section.

Then, being a valid transaction, the next question is, for what is it good? It is admitted by Mr. *Hastings*, as representing the *National Bank*, that the precise transaction for which the deposit was made has been covered. The bills have been discounted and paid, and there is nothing due upon them within the exact terms of the resolution, as I read them. The real point in dispute is this: It being admitted, that after paying the bills which fall directly and literally within the description of that for which the security was given, there will be a balance in the hands of the bankers of some £400 or £500, whether the *National Bank* can retain the balance, or whether they are bound to hand it

(1) Law Rep. 10 Eq. 515. (2) Law Rep. 10 Eq. 298.

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over to the official liquidator? This, therefore, is a case in which a security is given, and the security being more than enough to cover the precise debt for which it is given, and there being a surplus in the hands of the creditors, the question arises whether they can retain it to cover a general balance irrespective of that debt, or must pay it over to the mortgagor. That is the precise point which was decided in *In re Haselfoot's Estate* (1) by the Master of the Rolls. It had previously been decided, as he states in his judgment, by himself in *Spalding* v. *Thompson* (2). That was a mortgage of a policy of assurance to secure a particular debt of £300. The policy dropped. The total amount of debt, interest, and costs, was £438, and there was left in the hands of the mortgagees, who were a firm of solicitors (Messrs. *Chauntler & Crouch*), £61 12*s.* 4*d.* The Master of the Rolls said: "The question is, whether Messrs. *Chauntler & Crouch* are entitled to retain the balance in their hands in discharge of the amount which is due to them, or whether they must come in and prove for their bills of costs and take a dividend upon the estate? Of course the question would not arise unless the estate were insolvent. I think they are entitled to retain the amount of the bills of costs out of the balance in their hands." Then he cites *Spalding* v. *Thompson*, in which a mortgage to secure a Government debt had been created by Lord *Suffield*. He there decided that the mortgagee was entitled to retain against his general balance. His Lordship then said, "This is not a question of set-off. The question of set-off arises where there are different payments by a testator to a stranger and by the stranger to the testator and different rights in respect of such payments." It seems to me, on this general principle, that if *A.* creates a mortgage in favour of *B.*, and the mortgage being realized, he has the balance in his hands, natural justice would seem to point out that he would be entitled to retain the surplus and apply it in payment of a general debt due to him. That is what the Master of the Rolls decided in that case; therefore, as in this case the *General Provident Company* is indebted to the *National Bank* in a sum of money beyond what was secured by the deposit, it seems to me they are entitled to retain the possession of this security in satisfaction of their debt.

(1) Law Rep. 13 Eq. 327. (2) 26 Beav. 637.

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The order will therefore be—

The Court being of opinion that the proceeds of the leaseholds are applicable not only to the secured fund, but also for what may be due to the company; refer it back to Chambers to ascertain what is due.

The question whether this is or is not a debt can be contested under that reference. As the necessity of the case involved its coming into Court, I think the costs of both parties must be costs in the winding-up.

Solicitors for the Bank: Messrs. *W. Tatham & Son.*
Solicitors for the Company: Messrs. *Kimber & Ellis.*

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BARDWELL *v.* SHEFFIELD WATERWORKS COMPANY.

[1872 B. 219.]

Special Case—Income and Capital—Interest on unproductive Capital—Statutory Jurisdiction—Sir G. Turner's Act (13 & 14 *Vict. c.* 35, *s.* 1)*—Practice—Representative Parties to Special Case.*

21 L.T. 155

A company incorporated by Act of Parliament, being already in possession of works constructed by means of capital raised by the issue of shares, obtained by a later Act power to raise more capital for the construction of additional works. These works were of a peculiar kind, and could not be constructed by means of contracts taken in the usual way, but required that the company should find the plant and employ workmen to act as directed by their engineer. The capital for the works was raised by the exercise of borrowing powers and by preference shares, the holders of which had certain options to convert them into ordinary shares:—

Held, that the company were entitled to add to the capital required for the construction of the works the amount of the interest or dividends on the loans or shares by means of which it was raised until the completion of the works.

The Court heard a special case, under *Sir G. Turner's Act*, to determine questions arising between classes of persons respectively represented by one of them on behalf of all others in the same position.

THIS was a special case under *Sir G. Turner's Act* (13 & 14 Vict. c. 35), between *Frederick Bardwell*, on behalf of himself and all other the ordinary shareholders in the *Company of Proprietors of the Sheffield Waterworks*, except such as were Defendants thereto,

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as Plaintiffs, and the *Company of Proprietors of the Sheffield Waterworks*, and certain persons named, and *John Russell*, for and on behalf of himself and all other the holders of B, C, and D preference shares in the said company, as Defendants.

The special case stated that by the *Sheffield Waterworks Act*, 1853, the company had power to raise, for the construction of reservoirs and other works, £450,000, and to borrow or raise by preference shares £110,000; and that the whole £450,000 had been raised by ordinary shares, and £11,200 of the £110,000 by preference shares; and that two reservoirs had been completed before 1864, in which year one of them, the *Dale Dike Reservoir*, gave way and caused an inundation which subjected the company to heavy losses and liabilities; to provide for which the *Sheffield Waterworks Act*, 1864, was passed.

Under that Act the company was empowered to raise £400,000 in addition to all other money which they had power to raise, which was to be applied, first, in payment of liabilities arising out of the inundation; secondly, in the purchase-money for land taken under the Act; and thirdly, for other purposes of the Act, and, subject thereto, for the general purposes of the company.

The special case then referred to the *Sheffield Waterworks Act*, 1866, under which the company was authorized to borrow £150,000, and the *Sheffield Waterworks Act*, 1867, under which the construction of certain reservoirs and other works was authorized, and they were allowed to raise £500,000 additional capital and to borrow £166,000. It was then stated how the capital had been raised, and, amongst other things, that part of it had been raised by preference shares of three classes, indicated by the letters B, C, and D, the holders of which had certain options of converting them into ordinary shares.

It was then stated that a dividend had always, except in 1864 and 1865 (when, in consequence of the inundation, there was none), been declared for the half-year ending the 30th of June, and paid on the 1st of November following, and that three reservoirs were in course of construction during the whole of the year ending the 31st of December, 1871, and were not used, and could not be used, for the supply of water within the district of the company, and produced no income to the company.

The special case then, after stating that money produced by the ordinary share capital had been employed in the construction of the reservoirs, continued as follows:—

"The said three reservoirs are, and all other the works by the company's Acts authorized to be made will be, such as would, in the ordinary course of business, be constructed out of capital, and would be entrusted to contractors who would contract to construct the same in consideration of stated sums to be paid by the company at deferred periods, and on the ascertainment of which the contractor, in the ordinary course of business, might and would charge the company with the full amount of the interest on the outlay from time to time incurred by him in the execution of the works, so that on the instalments due to him under the contract being paid to him by the company, as they in their ordinary course would be paid out of the company's capital, the interest on capital during construction would in effect be defrayed out of capital.

"Until the accident in the year 1864 the works of the company were, with some small exceptions, constructed by contractors in the manner aforesaid; but in consequence of that accident hydraulic engineers advise that, in the construction of embankments for impounding large bodies of water and the works connected therewith, precautions to insure safety ought to be used much greater than were before that accident considered necessary.

"In order effectually to carry out such precautions, the company has, since the commencement of the year 1865, proceeded with the said works without a contractor, and under the immediate superintendence of its own engineer-in-chief, who has, with a view to insure the stability and efficiency of the works, the power from time to time to alter the design of such works to meet any peculiarity which may be discovered in the ground or strata in which they are situate, to alter the mode of construction of the same and the materials used therein, and generally to act as circumstances may require for the safety and due execution of the works, which alterations could not conveniently be made if the works were carried on by contractors under specifications such as are usually adopted.

"In proceeding with the works in the manner before mentioned,

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the company from time to time pay for the land purchased for such works, and for the machinery, materials, and labour used in the construction of the same, immediately on the amounts becoming due, and as to the amounts payable for such labour by weekly or fortnightly payments, and since the commencement of the year 1865 all payments for such land, materials, machinery, and labour have been made out of moneys raised by the creation of preference shares or by borrowing, and such moneys consequently immediately on being raised began to bear dividends or interest in diminution of the dividend on ordinary shares."

The facts were then stated, shewing that the amount of capital applied to works as yet unproductive amounted in the year 1871 to £190,941 3*s.* 5*d.*, and it was explained that it was for the interest of the parties represented by the Plaintiff that the interest on the unproductive capital should be provided out of capital, and that the parties represented by the Defendant *John Russell* were interested in maintaining the opposite contention.

The questions submitted for the Court were: Whether by law the company and the directors, in declaring and paying dividends on ordinary shares, were at liberty and ought to charge against and defray out of capital all or any and what part of the interest and dividends accrued since the 31st of December, 1871, and thereafter to accrue due on or in respect of the capital from time to time raised by borrowing or the creation of preference shares or stock, and expended in the construction of the reservoirs and works, or the acquisition of land, till the works should come into operation? There was another question, as to whether the same principle could be made to apply to the year 1871, and a further one as to the costs of the special case.

Mr. *Bagshawe*, for the Plaintiff, as representing the ordinary shareholders:—

The question is, whether the ordinary shareholders ought to be in a worse position because the works are required to be carried out in a manner differing from the ordinary one.

Mr. *Charles Hall*, for the company, took no part in the argument.

Mr. *Robinson*, for the Defendant, as representing the B, C, and D preference shareholders :—

The question is one which the directors ought to have determined for themselves. The principle which the Court is now asked to sanction has been already condemned in *Bloxam* v. *Metropolitan Railway Company* (1).

SIR R. MALINS, V.C. :—

I do not think there can be any reasonable doubt as to this matter. The difficulty has arisen out of the disastrous bursting of the reservoir in 1864, which gave occasion for a great expenditure of capital in the restoration of the old works and the construction of new ones. It does not appear whether a contractor would have undertaken the performance of the works on the ordinary system ; but they have occupied three years, and large sums of money have been expended upon them, which have been provided by the exercise of borrowing powers and the issue of preference shares. The question is whether the sum paid for interest on the sums borrowed and the dividends on the preference shares during the time in which the capital remained unproductive are to be attributed to income or capital. I think it is clear that if the works had been performed by a contractor in the usual way, he would either have arranged his prices so as to include in the profits the interest on the capital and plant employed by him, or would have added interest on capital to the amount of his estimates. Therefore in either case the interest on the capital employed would be found in the price paid for the work.

In the present case the company, having performed the work, have been compelled to pay interest on the unproductive capital, and I think the interest so paid formed part of the capital employed in the work. I think that *Bloxam* v. *Metropolitan Railway Company* has no application ; but I find that in that case Lord *Chelmsford* expressed a doubt as to the soundness of the principle which had been laid down by the Vice-Chancellor, and I concur in the doubt he expressed. I understand also that the railway

(1) Law Rep. 3 Ch. 337.

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company obtained an Act of Parliament to sanction the practice which led to that suit.

The first two questions will therefore be answered in the affirmative, and the costs of all parties will be borne by the capital account.

Solicitors: Messrs. *Pitman & Lane.*

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HOARE *v.* BREMRIDGE.

[1872 H. 141.]

Policy of Assurance—Conflict of Evidence—Jurisdiction—A Court of Law the Proper Tribunal.

A bill having been filed by an insurance company to cancel a life policy as obtained by misrepresentation, a motion was made to restrain an action upon the policy which was commenced immediately after the filing of the bill:—

Held, that this Court had complete jurisdiction, but that the question would be more suitably tried before a jury; and motion refused accordingly.

THIS was a bill filed by the *Sun Life Assurance Society* praying a declaration that a certain policy of assurance was obtained by Mrs. *Formby* by concealment and misrepresentation, and that the same was void, and ought to be delivered up to be cancelled, and that in the meantime the Defendant, *Thomas Julius Bremridge*, the representative of Mrs. *Formby*, might be restrained from bringing any action against the Plaintiff or the society in respect of such policy.

From the statements in the bill it appeared that the policy in question, upon the life of Mrs. *Formby* for £5000, was effected on the 30th of December, 1870, upon the application of *Thomas Lyle*, M.D.

The usual papers sent by the insurance office requiring particulars as to the life of the person intending to effect a policy were filled up in the following manner:—Mrs. *Formby* stated that she was twenty-seven years of age, that her usual medical attendant was *Arthur Kempe*, whom she had last seen in the previous

month of April, when he attended her during her confinement. This form was accompanied by the following certificate: "I do hereby certify that I am now in good health, that I do ordinarily enjoy a good state of health, that I am sober and temperate in my habits of life, and that I am not aware of any circumstance tending to shorten my life or to render an assurance on it more than usually hazardous. And I do hereby certify that I have not had occasion for medical advice or assistance during the last two years, excepting for confinement and passing ailments. Also I know no other medical practitioner so competent to certify as to my health, habits, and constitution, as *Arthur Kempe*, to whom I have referred. The policy is desired in the name of *Thomas Lyle*, M.D., *Wonford House, Exeter*." This declaration was signed on the 8th of December, 1870, and was indorsed by *Thomas Lyle*, who stated that he had an interest in the life of Mrs. *Formby* to the full amount of the sum to be insured; that the said Mrs. *Formby* was then in good health, excepting a passing ailment; that she ordinarily enjoyed a good state of health, that she was sober and temperate in her habits of life, and that he was not aware of any circumstance tending to shorten her life or to render an assurance on it more than usually hazardous.

Dr. *Kempe*, the medical practitioner referred to by Mrs. *Formby*, sent a reply to the questions put to him by the insurance company on the 17th of December, in which he stated that he had attended her in two severe confinements (both instrumental), from which she made quick recovery, and once or twice for slight stomach derangement. That her general state of health was good, that she was not afflicted with disease or disorder of any kind that he was aware of, and that he did not know of any circumstance which might be considered as tending to shorten her life or to render an assurance on it more than usually hazardous. There were also certificates as to the general health of Mrs. *Formby* from two gentlemen who were not medical practitioners. Mrs. *Formby* was also examined by Dr. *Budd*, the medical referee of the assurance society, who reported that he found her to present every indication of a sound constitution, that she appeared to be in perfect health, and he considered her to be quite eligible for life insurance, in fact to be a first-class life.

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Upon these certificates the policy was effected, and was executed on the 30th of December, 1870.

Mrs. *Formby* made her will in January, 1871, and thereby bequeathed the policy of assurance and all the residue of her property to *Thomas Lyle*, and appointed the Defendant *Thomas Bremridge*, and another person, since deceased, executors of her will.

She died on the 1st of February, 1872, and an application was shortly afterwards made to the insurance society for payment of the amount of the policy, which they expressed themselves ready to do on the 21st of June inst. The society had recently, and since the promise to pay, discovered that Mrs. *Formby* at the time of effecting the policy was not in a good state of health, and that she was afflicted with a disorder tending to shorten life, and with serious disease, and that it was untrue that she was not aware of any circumstance tending to shorten her life or to render an insurance on it more than usually hazardous.

The charges in the bill entered into minute details respecting the disease from which Mrs. *Formby* was suffering when the proposal was made for insuring her life, and which had arisen from injuries received in her last confinement. That in the month of April or May, 1871, she came to *London* to obtain medical advice and treatment in consequence of the injuries she had so sustained, and was for some time under the treatment of Dr. *West*, Dr. *Hewitt*, and Dr. *Tyler Smith;* that a surgical operation was performed upon her in November, 1871, from which she never fully recovered, and that in consequence of such operation, and as the result of the injuries sustained by Mrs. *Formby* in her last delivery, an abscess was formed, from the effects whereof she died on the 1st of February, 1872.

It was also alleged that when the proposal for insuring her life was made by Mrs. *Formby* she was well aware of the state of her health, and in order to induce the society to grant the policy she concealed the fact of her not having recovered from her last delivery, and that she did not inform the society or Dr. *Budd* that she was still suffering from disease; that if they had been so informed they would have refused to insure her life or to undertake any risk upon such a life, but they had no information or intimation of such matters till after the death of Mrs. *Formby*.

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This bill was filed on the 14th of June, seven days before the day on which the society proposed to pay the amount of the policy, and an action was commenced against the society by the Defendant *Thomas Bremridge* on the 21st of June.

Mr. *Cotton*, Q.C., and Mr. *Bush*, now moved for an injunction to restrain the action :—

This is a bill to set aside a policy on the ground of concealment and misrepresentation. There is perfect jurisdiction in this Court to decide such a question, which depends upon fraud, and we desire to have the case tried here, where we believe that justice will be better and more speedily administered than in the Court of Law. This bill was filed on the 14th of June, and the action was not commenced till the 21st, therefore, as we were first in choosing our forum we have a right to come now and restrain the action. The bill is filed under circumstances very similar to those in the *British Equitable Insurance Company* v. *Great Western Railway Company* (1). In that case a representation was made by the person insuring his life, but before the premium was paid he consulted another medical man, who told him that his life was in peril, and without communicating that fact he paid the premium and the policy was executed. A bill was filed by the insurance office to have the policy declared void, and to restrain any proceeding at law upon the policy. Your Honour there decided that the policy was void, and the Court of Appeal affirmed that decision. An interlocutory injunction had been granted, but it does not appear that it was opposed. In another case, upon a bill filed by the *British Provident Life Assurance Company*, your Honour also set aside a policy, on the ground that the person insured had been refused a policy by several other offices, and had not communicated the fact to the office which had accepted him. In this case it is so clear upon the evidence that the statements made by Mrs. *Formby* were not in accordance with the facts which she must have known as to the state of her health, that there can be no necessity for sending it before a jury. The jurisdiction of this Court in questions of policies is entirely settled by the case of *Traill* v. *Baring* (2).

(1) 38 L. J. (Ch.) 132, 314.
(2) 4 Giff. 485 ; 4 D. J. & S. 318.

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Mr. *Glasse*, Q.C., and Mr. *C. Hall*, for the Defendant:—

We do not question the jurisdiction of the Court in cases of fraud. We admit that this Court has concurrent jurisdiction with the Court of Law; but we say that a question of this nature, depending as it does, entirely upon a conflict of evidence, will be better tried before a jury, where the witnesses are examined *vivâ voce*, and cross-examined in open Court, than in the Court of Chancery, where the evidence will be taken before the Examiner.

These cases arising upon policies of assurance are more particularly appropriate to the form of trial at common law, where the medical testimony can be thoroughly sifted and the truth of the matter elicited.

The accident of the bill having been filed before the action was commenced has nothing whatever to do with the case. The action was commenced on the very first day it could be commenced, since the insurance company proposed to pay the money on the 21st of June, six months after the death of the insured. In a recent case of *Freeman* v. *Greenwood*, before Vice-Chancellor *Wickens*, in which the policy was effected under circumstances similar to those in the case of the *Planet Insurance Company* v. *Greenwood*, decided by your Honour in February last, the Vice-Chancellor said he thought it made no difference that there had not been any action commenced when the bill was filed by the company, and he refused the motion upon the evidence, saying that the question would be more conveniently tried in an action if the defendant thought fit to bring one against the company.

The cases in which this Court has decided the question between the parties have been brought on at the hearing, when all the evidence had been gone into. This case is in a very different position, no evidence has yet been taken, and no expense incurred beyond the filing of the bill. *British Equitable Insurance Company* v. *Great Western Company* (1) was decided at the hearing, and so was *Traill* v. *Baring* (2); and in the *Planet Insurance Company* v. *Greenwood* your Honour decided that it was a case to be tried at law, and you refused to restrain the action. All that was done in those cases was to remove some difficulty out of the way

(1) 38 L. J. (Ch.) 132, 314.
(2) 4 Giff. 485; 4 D. J. & S. 318.

in order that the case might go on at law. And in *Lee* v. *Lancashire and Yorkshire Railway Company* (1) great importance was attached to the advantage of having a case of conflicting evidence tried at law where the witnesses can be seen and their demeanour observed.

But supposing this case were brought to a hearing, it would then be competent for the Court, under *Sir John Rolt's Act*, to refer the question to a Court of Law if it shall think that would be the most convenient tribunal, and we have every belief that this course would be taken; and if so, all the expense of the evidence in Chancery would be rendered useless. There is no contention in this case which may not be as easily urged at law as in this Court, and no ground of equity which is not strictly within the jurisdiction of a Court of Law.

Mr. *Cotton*, in reply:—

It would be denying and giving up the jurisdiction of this Court if we are bound by the result of the action at law. The Plaintiffs in filing this bill have a right, if they think fit so to do so, to say that this Court having a jurisdiction on the question of fraud shall order the policy to be delivered up to be cancelled.

SIR R. MALINS, V.C.:—

This is a motion by the *Sun Life Assurance Society* against the representative of Mrs. *Formby*, a lady whose life was insured in that office for the sum of £5000, to restrain an action which has been brought on the policy. Mrs. *Formby* died on the 1st of February, 1872; and it appears that the usual application having been made for the payment of the sum assured, the office, then having no suspicion that there had been any unfair dealing with them, wrote to Mr. *Bremridge*, the executor of Mrs. *Formby*, on the 8th of April, 1872, informing him that the claim under this policy would be paid on the 21st of June. Now the life having expired on the 1st of February, the office had all the time from February to April to ascertain whether there was anything wrong. But it does not follow that they would necessarily be successful in discovering that any imposition had been practised on them. And

(1) Law Rep. 6 Ch. 527.

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for the purpose of my decision on the motion I assume that it may turn out that all the representations made by the office, namely, that they were induced to effect the policy by fraud, that is, by the want of communication of facts which ought to have been communicated to them with regard to the health of the life assured, and by the suppression, and indeed positive misrepresentation, of things of which they ought to have been told, may be perfectly correct, and that this policy is one which may turn out to be void. By the rules of the office, and by the course of communication between the parties, no action could have been brought on this policy till the 21st of June at the earliest. That is an admitted fact. On the 14th of June, seven days before that time, the *Sun* office filed this bill, which prays that it may be declared that the policy was obtained by Mrs. *Formby* by concealment and misrepresentation; and that the same is void and ought to be delivered up to be cancelled, and that in the meantime Mr. *Bremridge* may be restrained by injunction from continuing or prosecuting the action against the plaintiffs, and that the defendant may pay the costs of this suit.

Notwithstanding the filing of this bill on the 14th of June, Mr. *Bremridge* commenced an action against the office on the 21st, the very earliest day that he was enabled to do so. And now the question is, whether that action is to go on, or whether I am now to stay it upon this motion.

The case certainly raises considerations of very great importance. That there is concurrent jurisdiction in this Court with Courts of Common Law on all matters of fraud cannot be questioned, and has not been questioned. It is perfectly clear to my mind that if this were the hearing of the cause I should be bound to decide the question in accordance with what I did in the case of *British Equitable Assurance Company* v. *Great Western Railway Company* (1). There the question was whether a policy was valid or invalid in consequence of the person assured not having communicated a fact to the office which he was bound to communicate, namely, that subsequent to the acceptance of the proposal by the office he had consulted another medical man, who had given an unfavourable opinion of his life. That fact being withheld from the office, I

(1) 38 L. J. (Ch.) 132, 314.

held, and in that holding I was confirmed by the Court of Appeal, that that was a concealment of a fact which vitiated the transaction, and accordingly I ordered the policy to be delivered up to be cancelled; and I further decided, and in that I was also confirmed, that this Court had complete jurisdiction over the matter just as much as a Court of Law. In the present case I am of opinion, also, that this policy being impugned on the ground of fraud, it is within the jurisdiction of this Court as much as within the jurisdiction of a Court of Law to decide whether the policy is or is not valid.

But it must be borne in mind that the ordinary remedy under a policy of assurance, whether it be a marine, a life, or a fire insurance, is by an action at law. And I think it ought to be well understood, and it is most important, in my opinion, that it should be understood, by all persons who grant policies of insurance, whether underwriters or insurance offices, that if any question arises upon policies, unless there are extraordinary circumstances, the proper tribunal to decide those questions is a Court of Law.

If this practice is to be encouraged, there is not a single marine insurance which might not be brought to this Court to be decided. There was a case lately tried as to the validity of an insurance on a ship, and it was objected that the policy was void, because the captain, being the agent of the assured, had scuttled the ship. If Mr. *Cotton's* contention is right, that this Court, because a bill is filed immediately before an action can be brought, has seizin of the matter, and has jurisdiction, that question—which never could be properly tried in this Court on written evidence, and upon which no satisfactory conclusion could have been arrived at, except by the examination of witnesses—still, if the bill had been filed by the underwriters before the action was brought, it must necessarily have been tried in this Court. So on a fire policy, it is very true that this Court has concurrent jurisdiction, and in a case lately before me, in which a bill was filed by a person who had insured his premises for one month, in the *European Assurance Society*, the society, by every device that an office could have recourse to, endeavoured to get out of the liability of paying the policy. But, upon a full hearing of the evidence, I made a decree against them, with costs, because I then satisfied myself that in all these cases this Court has concurrent jurisdiction with the Courts of

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Law. That was a case in which the question was raised for the first time at the hearing of the cause; and undoubtedly, if this were the hearing of the cause, I do not think I should consider it proper to send these parties to a jury. But it is of the highest importance that it should be understood, according to my view at all events, that it is not competent for underwriters or insurance offices, directly the policy has become due, to file a bill in this Court, and, as a matter of right, call upon this Court, by written evidence, to take the case away from a jury, which is the proper and the only satisfactory tribunal, in my opinion, to decide such a case.

In the observations, therefore, of the Lords Justices in *Lee* v. *Lancashire and Yorkshire Railway Company* (1), I most entirely concur —that in all these questions it is most important they should be tried where the witnesses are seen, where their demeanour is witnessed, where the parties have a full opportunity of cross-examination—not such a cross-examination as we have before a special examiner, or before the ordinary examiner of the Court, or even that kind of cross-examination which we may have here, when the parties have made up their minds, by pledging themselves to a written affidavit, but upon evidence where the witnesses are brought before the jury for the first time and examined—it is, in my opinion, most important that the evidence in such cases should be taken in that form.

Now what are the grounds that have been urged upon me for stopping this action? It is said that this lady knowingly suppressed the fact that she had been attended by another medical man, whose name is not given, that she was subject to certain diseases in consequence of her confinement, which, upon the statement in the bill, appears to be so. All that may be a ground for saying that this policy is void, but where would be the difficulty of bringing that before a jury? The Plaintiff in the action on the policy will, I apprehend, put in the policy, and the office will set up their defence, and every word of defence which they can set up here will be equally effective for them at law. Their defence will be, as it is here, that there was a suppression of facts which ought to have been communicated to them, that this lady, instead

(1) Law Rep. 6 Ch. 527.

of being in a good state of health, was in the most dangerous condition, and that if she was in the family-way again, it was highly improbable that she would get through her confinement with her life. If all that is true, there is no doubt that it would vitiate the policy. But if true, what difficulty is there in having it tried by a jury? They will call the medical man who attended her; they will make him prove that she had these diseases which were not communicated; they will make him prove that the statement is untrue in which she says, "I do hereby certify that I am now in good health, and that I do ordinarily enjoy a good state of health, and that I have not had occasion for medical advice or assistance during the last two years excepting for confinement and passing ailments." If there is any truth in that, they will call the medical man who attended her, not for passing ailments, but a disease of the most dangerous kind, which she could not be subject to without her life being in the highest degree exposed to danger.

Now, what equity is there in this case? Why is it expedient that such a case should be transferred to this Court to be tried on written evidence, when it can be so readily tried in the ordinary way by the witnesses being examined?

In the case that was before me of the *Planet Insurance Company* so recently as the 8th of February last, the *Planet* filed a bill and moved to restrain an action which had been brought against them on a policy of insurance. The objection taken was as to the validity of the policy. It was a fraud of this kind, that while one man professed to insure his own life they said it was another man who had insured his life, and it would be a fraud on them to make them pay on a policy which was void at law. The action had been commenced, and I decided it on two grounds—first, that such a question was the proper subject for a trial at law, and secondly, that the action having been commenced before the bill was filed, the person claiming under the policy had selected his forum and there was no ground to sustain the motion. It appears that since my decision a similar case has been before Vice-Chancellor *Wickens*, in which no action had been brought. Mr. *Kekewich* has been kind enough to send me the bill in that case of *Freeman* v. *Greenwood*, which was against the same Defendant as in the *Planet* case, and on

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the same life which had been assured in the *General Assurance Office*. Mr. *Freeman* was the officer of that company, and before an action was brought, the office, by Mr. *Freeman* its officer, filed a bill to restrain any action. Vice-Chancellor *Wickens*, as I understand, took the same view as I have taken of this case. He thought it much more expedient that such a question should be decided by a jury, although no action had been brought, and I do not understand that he had the slightest doubt as to this Court having complete jurisdiction on such matters, as I have no doubt. Therefore, acting on the perfect conviction that this Court has that jurisdiction, which I have exercised more than once—it is not because the Court has not jurisdiction, but because I think it is most inconvenient to exercise it—considering also that the action has only just commenced, and that nothing more than the filing of the bill has been done, I think I shall be more likely to do justice by refusing the motion than I can do by staying the action. Upon those grounds, therefore, I refuse the motion, and the costs will be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Ranken, Ford, Longbourne, & Longbourne.*

Solicitor for the Defendants: Mr. *J. Elliott Fox.*

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[1870 W. 154.]

V.-C. B.
1872
April 30.

Marriage Settlement—Power of Appointment—Invalid Exercise of Power—Extent of Invalidity—Power of Appointment over Realty—Vesting of Share before Appointment—Conversion of Realty.

Husband and wife, having a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed part of the fund to trustees upon such trusts as *H.* (one of the sons) should by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of the father's will, or by will appoint; and in default of such appointment, upon trust for *H.* for life, or until bankruptcy or assignment; and after *H.*'s death, upon trust for his executors or administrators; but if such interest should have determined, upon such trusts as would have affected the property if the same had been appointed to *H.* during his life, or until such determination only: —

Held, that the above appointment was valid only to the extent of giving to *H.* an estate for life, or until bankruptcy or assignment; and that, as to all the rest, it was void.

Husband and wife had a joint power of appointment over real estate amongst the children of the marriage. In default of appointment, the estate was to be held, subject to the parents' life interests, in trust for all the unappointed children, the shares to vest at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for sale.

A son attained twenty-one and died intestate. Afterwards the husband and wife appointed two-fourths of the real estate, and declared that the shares of the persons beneficially interested in the capital arising from any sale of the premises should be of the quality of personal estate. A sale having taken place under the power in the settlement:—

Held, that the interest of the heir of the deceased son was defeated by the conversion.

Varied by C.A. 14 W.R. 8 Ch. 419.

FURTHER CONSIDERATION.

By one of two settlements, dated the 13th of November, 1821, executed prior to the marriage of *George Stebbing Sadler* and *Louisa Firmin*, certain personal estate, the property of the intended wife, was settled upon trusts for the benefit of the intended wife for life for her separate use, without power of anticipation, remainder to the intended husband for life, remainder to the children of the marriage as the husband and wife should jointly, or as

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the survivor should by deed or will, appoint, and in default for all the children who, being sons, should attain twenty-one, or being daughters, should attain twenty-one or marry, in equal shares, assignable to such children at the respective ages or times aforesaid.

The settlement contained no hotchpot clause.

By the other of the two settlements certain real estate, the property of the intended husband, was conveyed to trustees and their heirs from and after the determination of the life estates therein of the intended husband and wife, to the use of the children of the marriage as the husband and wife should jointly, or as the surviving husband should by deed or will, appoint; and in default, "in trust for all and every such child and children of the said *G. S. Sadler* by the said *L. Firmin*, to whom or for whose benefit no part or share of or in the said premises shall have been so appointed as aforesaid," in equal shares as tenants in common, to vest at twenty-one or marriage.

This settlement contained the usual power of sale and exchange, with trusts for the reinvestment of the proceeds in land to be settled to the same uses; but no trust for sale.

On the same day *G. S. Sadler* executed a bond, conditioned to be void on payment by the heirs, executors, or administrators of *G. S. Sadler*, within one year after his decease, to the trustees of the second settlement of £2000, to be applied by them according to the trusts of the same settlement.

There were issue of the marriage four children—*George Thomas*, *Harcourt*, *Clara Sophia*, and *Henry Robert Sadler*.

Harcourt Sadler attained twenty-one, and died on the 5th of April, 1852, intestate, and leaving his father, *G. S. Sadler*, his heir-at-law.

On the 1st of May, 1852, *G. S. Sadler* and *Louisa* his wife made an appointment of one-third of the funds comprised in the first settlement, subject to their own life interests, to *George Thomas Sadler* absolutely.

On the 1st of June, 1856, *G. S. Sadler* and *Louisa* his wife appointed another third of the same funds, subject as above, in favour of *Clara Sophia Sadler*, who shortly afterwards married *John Weir*, upon which occasion her share was settled.

By a deed-poll dated the 19th of December, 1859, *G. S. Sadler* and *Louisa* his wife appointed the remaining third of the personalty to trustees, upon trust, from and after the decease of the survivor of *G. S. Sadler* and *Louisa* his wife, thereout to raise £1500 and interest upon certain trusts, and to stand possessed of the residue upon such trusts as *Henry Robert Sadler* at any time should by deed "to be duly executed by him, but nevertheless with the consent in writing of the said *G. S. Sadler* during his life, and after his decease with the like consent of the persons or person who for the time being shall be the acting trustees or trustee under any last will and testament of the said *G. S. Sadler*, and whether therein named, or to be appointed under any power therein, or by the Court of Chancery, or other competent authority, and which consent . . . shall be testified by his or their signature of the deed or deeds by which any such appointment or appointments shall be made;" or as *Henry Robert Sadler* should by will appoint; and in default of such appointment, upon trust to pay the income to *H. R. Sadler* for life, or until his interest should sooner determine under the provision thereinafter contained; and from and after his decease, if his interest should not have determined, upon trust for his executors or administrators as part of his personal estate; but if such interest should have determined, upon the like trusts as would have affected the residue of the same third share, if the same had been duly appointed in favour of *H. R. Sadler* "only during his life, or until the period of such determination:" provided always that if *H. R. Sadler* at any time during the lives or life of *G. S. Sadler* and *Louisa* his wife, or the survivor of them, "or during the period of twenty-one years next after the decease of "such survivor" should be declared bankrupt, or take the benefit of any Insolvent Debtors Act, or assign, alien, charge, or in any manner incumber or affect the income thereinbefore directed to be paid to him after the decease of the survivor of *G. S. Sadler* and *Louisa* his wife, the trust thereinbefore declared for his benefit during his life should absolutely cease, and thenceforth during his life the same income should be held in trust for and paid to the persons to whom the same would be payable if *H. R. Sadler* "were then dead."

By another deed-poll dated the same 19th of December, 1859,

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G. S. Sadler and *Louisa* his wife appointed two-fourths of the property comprised in the second settlement, subject to their own life interests, in favour of Mrs. *Weir* and *H. R. Sadler*. The trusts in favour of the latter were the same as those in the former settlement. By the same instrument the appointors declared that the shares and interests of the persons beneficially interested in the capital or principal moneys arising from any sale of the premises should be "of the quality of personal and not of real estate."

On the 14th of January, 1866, *George Thomas Sadler* died intestate, leaving a widow, sons and daughters, two of the latter of whom were now adults.

In the course of the year 1866, at the request of *G. S. Sadler* and *Louisa* his wife, the real estates were sold by the trustees under the power of sale in the second settlement.

On the 21st of August, 1869, *G. S. Sadler*, the father, died, having appointed executors. *Louisa*, his widow, died on the 12th of February, 1870.

The bill was filed on the 16th of June, 1870; and amongst the questions were the following: First, whether the powers given by the deeds of the 19th of December, 1859, to *H. R. Sadler* of appointing, either by deed with the consents there mentioned, or by will if he should not previously have committed a forfeiture, were valid; and whether, if such powers were invalid, the limitations in default of their exercise failed also; and, secondly, whether, after a share in the real estate comprised in the second settlement had become vested in remainder in the unappointed son who died, the declaration in the second deed of December, 1859, that the proceeds of sales should be deemed to be of the nature of personal estate, was binding as against his heir-at-law.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the Plaintiffs, Mr. and Mrs. *Webb*, an adult daughter of *George Thomas Sadler* and her husband:—

The attempt of the father and mother, by the appointment of December, 1859, to give this power to *Henry R. Sadler* of appointing by deed must be held to have failed. *Henry Sadler* not having been *in esse* at the date of the creation of the power, *i.e.*, the date of the settlement, the attempt to give him a power

exercisable with certain consents after the death of the father is an infringement of the rule against perpetuities. The trustees of the father's will, whose consents are required, are strangers to the original power.

Another objection is, that this is an attempt by the father to delegate a power.

The attempt to give a power to *Henry R. Sadler* (if he shall not have previously committed a forfeiture) of appointing by will only is also void, on the ground that the fund is thus necessarily tied up during his life: *Wollaston* v. *King* (1).

As to the limitation in default of appointment, inasmuch as the event which alone will prevent *Henry Robert Sadler* taking an absolute interest must occur within the lives of persons living at the date of the settlement and twenty-one years, we contend it is not too remote.

Upon the other question, we submit that there was an effectual conversion by the second deed of December, 1859, and that whatever came to *George Thomas Sadler* under the second settlement came to him as personal estate, and did not pass to his heir.

Mr. *H. Humphreys*, for the widow of *G. T. Sadler*:—

Upon the authority of *Wollaston* v. *King*, it is contended that there is a valid appointment to *Henry Robert Sadler* for life, and no more; that the attempt to give him a power exercisable with the consent of other persons fails; also that there was an effectual conversion of the real estate, notwithstanding the prior death of *Harcourt Sadler*: *Kenworthy* v. *Bate* (2); *Fowler* v. *Cohn* (3).

Mr. *Eddis*, Q.C., and Mr. *Haynes*, for the administratrix of *George T. Sadler*.

Mr. *Kay*, Q.C., and Mr. *Warmington*, for the eldest infant son and heir-at-law of *George T. Sadler*:—

On the first point we agree with the Plaintiffs' argument. The result of the deeds is, that if within twenty-one years after the

(1) Law Rep. 8 Eq. 165. (2) 6 Ves. 793.
(3) 21 Beav. 360.

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death of the survivor of the two appointors, *Henry Robert* assigns, the fund goes over; if he does not assign, he takes absolutely. The rest is void. At all events *Henry Robert* takes only a life estate in the realty.

As to the conversion, it was not possible for the appointors to alter the nature of the property. A fourth had vested as real estate in the heir of *Harcourt Sadler*. The settlement contained no trust for sale; it contained only a power of sale, with a trust that the moneys should be invested in the purchase of other lands.

The estates in the second settlement are legal, not equitable estates.

Kenworthy v. *Bate* (1) merely decides that a power of appointing real estate is well exercised by a devise upon trust to sell and divide the proceeds.

It is not competent for the donor of a power of appointment to say, "I appoint two-fourths of the estate only, but I direct the whole to be converted."

There was no intention to give the appointors power to divest a vested estate.

Mr. *Kingdon*, for the trustee of Mrs. *Weir's* settlement:—

Not only is the attempted appointment bad on the grounds suggested, but the infirmity vitiates the whole, including the estates limited in remainder after the void limitation: *Sugden* on Powers (2), referring to *Routledge* v. *Dorril* (3); *Ingram* v. *Ingram* (4).

Mr. *George Murray*, for the surviving trustee of *George T. Sadler's* settlement.

Mr. *Morgan*, Q.C., and Mr. *G. O. Edwards*, for *Henry Robert Sadler*:—

If the clause relating to consent be struck out, the rest of the appointment is good: *Bray* v. *Hammersley* (5), affirmed under the name of *Bray* v. *Bree* (6). No doubt the consent clause is invalid,

(1) 6 Ves. 793.
(2) 8th Ed. pp. 508, 515.
(3) 2 Ves. 357.
(4) 2 Atk. 88.
(5) 3 Sim. 513.
(6) 8 Bli. 568; 3 Cl. & F. 453.

both as being an attempt to import a stranger into the power, and as a violation of the rule against perpetuities. But this clause may be rejected, and the rest maintained and carried out: *Hamilton* v. *Royse* (1); *In re Cunynghame's Settlement* (2), referring to *In re Teague's Settlement* (3); *Churchill* v. *Churchill* (4); *Kampf* v. *Jones* (5); *Fry* v. *Capper* (6).

Mr. *William King*, for the surviving trustee of the settlements.

Mr. *Amphlett*, in reply.

Sir James Bacon, V.C.:—

The only questions that raise any sort of difficulty are those relating to the interest of *Henry Robert Sadler* under the appointment. It is quite clear that the restriction which the appointors intended to impose upon *Henry Robert Sadler* was to make the father's own consent, or the consent of the trustees of the father's will, or the consent of the Court of Chancery, necessary to the validity of any appointment by *Henry Robert Sadler*. The provision in that respect is this—it is an interest for life in *Henry Robert*, subject to the chance of his becoming bankrupt or assigning, upon which event happening the ultimate limitations are to take effect. That has not happened; and, as matters stand, he is entitled to an interest for his life, subject to the forfeiture clause. Nor can I see any difference between that and the provision made by the second settlement relating to the real estate. In that question is involved the point of conversion which has been so much argued, upon which *Kenworthy* v. *Bate* (7) and *Fowler* v. *Cohn* (8) seem to me to be conclusive. The interest of every one is defined by the settlement. The power to appoint in the settlement is open to no sort of doubt. It is to the use of all and every the children as the father and mother shall appoint, subject to certain powers, provisions, and limitations, and so forth. The power to direct the

(1) 2 Sch. & Lef. 315.
(2) Law Rep. 11 Eq. 324.
(3) Ibid. 10 Eq. 564.
(4) Ibid. 5 Eq. 44.
(5) 2 Keen, 756.
(6) Kay, 163.
(7) 6 Ves. 793.
(8) 21 Beav. 360.

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sale of the estate may in some cases be of vital importance. Whether it is or not, it is a power which the parties have reserved to themselves, and it was in the power of the father and mother at any time, and whatever was the state of the family, to exercise their own discretion and their own power, and to convert, if they should think fit, the interests which the children would take in the realty to interests in personalty, by their mere will and discretion. I think that was done effectually, and I do not think any question of coalescence arises. It is an interest arising under a family settlement; and what has been said as to *Henry Robert's* interest under the first settlement must also be said as to his interest under the second settlement. The estate was converted absolutely and entirely in the lifetime of the father and mother from realty, which it was, into personal estate, which it is; and the interests of all persons are distinctly and clearly ascertained.

The power given to *Henry Robert*, with the consent of the trustees, to appoint is wholly inoperative, leaving nothing but his determinable life interest, and his life interest in the realty is exactly the same as it is under the first settlement.

With respect to the claim of the heir, I think it is not to be asserted. The power of the settlor, I think, remained till the last hour of his life. Before his life came to an end he did exercise that power, and he converted the realty into personalty. If the heir's father had been alive at the time of the distribution taking place, he would have taken the share as personalty; and the heir can have no better right than his father would have had if that had been the case.

There will be no difficulty in preparing minutes in accordance with the above decisions.

The following is an abbreviated extract from the minutes:—

Declare that the appointment expressed in the indenture of the 19th day of December, 1859, so far as the same purports to give *Henry Robert Sadler* a power of appointment over the residue, after raising the sum of £1500 and interest, of the one-third share of the trust funds thereby appointed, and so far as the same purports, from and after the decease of said *Henry Robert Sadler*, and provided as therein mentioned, to give such residue to the executor or administrator of the said *Henry Robert Sadler* as part of his personal estate, is void.

Declare that the said *Henry Robert Sadler* is, subject to the clause of forfeiture

contained in the said appointment, entitled during his life to receive the dividends, interest, and annual income of such residue; and that, subject thereto, such residue is unappointed, and belongs, as to one fourth part, to the estate of the said *George Stebbing Sadler*, as the administrator and sole next of kin of his son *Harcourt Sadler*; as to one other fourth thereof to *Clara Sophia Weir*, or to the persons entitled in her right; as to one other fourth part thereof to *Henry Robert Sadler*; and as to the remaining fourth part thereof to the estate of the said *George Thomas Sadler*.

Declare that the appointment expressed in the indenture of the 19th day of December, 1859, so far as the same purports to give *Henry Robert Sadler* a power of appointment over one undivided fourth part of the trust funds subject to the trusts of the indenture of settlement of the 13th day of November, 1821, and so far as the same purports, in default of such appointment, to give such undivided fourth part, from and after the decease of the said *Henry Robert Sadler*, and provided as therein mentioned, to the executors and administrators of the said *Henry Robert Sadler* as part of his personal estate, is void; and that the said *Henry Robert Sadler* is, subject to the clause of forfeiture contained in such last mentioned appointment, entitled during his life to receive the rents, profits, dividends, and annual income of such undivided fourth part, and that, subject thereto, such undivided one-fourth part or share is unappointed, and belongs, as to one equal undivided moiety thereof, to *George Thomas Sadler*, or to his legal personal representatives; and as to the other one undivided moiety thereof to the estate of *George Stebbing Sadler*, as the administrator and next of kin of his son *Harcourt Sadler*, deceased.

Declare that the proceeds of the *H.* estate (the real estate) were converted into personalty by the indenture of the 19th of December, 1859.

Solicitor for the Plaintiff: Mr. *Joseph Beaumont.*

Solicitors for the Defendants: Messrs. *Johnson & Weatherall*; Messrs. *Bridges, Sawtell, & Co.*; Mr. *Mark Shephard*; Mr. *Hemsley*; and Mr. *A. C. Edwards.*

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1872

June 6, 7, 8, 11, 20.

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[1872 H. 113.]

Trade Name—Piracy—Injunction.

188 § 140, 1

A manufacturer who has produced an article of merchandise [*e. g.* a new pattern of cloth] and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction.

MOTION for an injunction to restrain the Defendants from selling, &c., cloth under the names of "*Turin*," "*Sefton*," "*Leopold*," or "*Liverpool*," and from using the said names for the purpose of describing any cloths sold by them, and from applying or affixing to any cloths manufactured or sold by them any ticket being an imitation of, or similar to, or only colourably differing from, the ticket used by the Plaintiff, and from selling cloth bearing any ticket being an imitation of, or similar to, or only colourably differing from, Plaintiff's ticket, or with the aforesaid name used by Plaintiff, or any of them.

According to the case made by the bill, the Plaintiff was a wholesale manufacturer of woollen cloths at *Huddersfield*, and, among others, of cloths known in the trade as six-quarter coatings and trouserings, in the manufacture of which he had exercised personal superintendence and established an extensive trade. To several of the patterns of cloths manufactured by him he had applied fancy names, not before used in the trade, for the purpose of distinguishing them; and cloths manufactured by him, and thus designated, had acquired celebrity, and were recognised and known as cloths of Plaintiff's manufacture and of a superior quality. Of these fancy names, which were stated to be "*Turin*," "*Sefton*," "*Leopold*," and "*Liverpool*," the name "*Turin*" was first adopted by Plaintiff

in 1859 as the distinguishing name of cloth of a particular pattern from an original design; and this name had ever since been used by him to distinguish the cloth manufactured by him of that pattern. The name "*Sefton*," was in like manner adopted by the Plaintiff, in 1863, to distinguish another pattern of cloth manufactured by him; and the names "*Leopold*" and "*Liverpool*" were adopted for the same purpose in 1870 and 1871, and had been ever since used by him. To distinguish the colours of the cloths so manufactured the Plaintiff employed numbers instead of specifying the particular colours of the patterns, and since 1860 cards or tickets, in a form designed for him in that year, had been affixed to the pieces of cloth sold by him.

This ticket, which was alleged by the bill to be so well known and recognised in the market as Plaintiff's trade mark that until the acts of the Defendants complained of no person other than the Plaintiff had ever attached to a piece of cloth any ticket resembling that of Plaintiff, was thus described:—"The ticket is about 1½ inches wide and 3 inches long. Near the top the word 'woaded' is printed in gold letters, and immediately under it is an embossed gilt curved line, and the word 'colour' is printed in small gilt letters underneath it, with a dotted gold line for the number to be filled in. Below that gold line there are several spaces. The ticket when used is filled up with a distinguishing name of the particular cloth to which the ticket is attached, and the number denoting the colour and length of the piece."

With the bales of goods sold by Plaintiff an invoice was sent containing the price, and attached to the bales a ticket in the form described, notifying the name and colour of the cloth and the number of yards contained in the bales. The bill alleged that the Plaintiff had become entitled to the exclusive user of the several names mentioned, as distinguishing names of the cloths of the different patterns manufactured and sold by him, and also to the exclusive user of the ticket for the purpose of marking his goods.

The Defendants, of whom *Dearnley* had been in the employment of the Plaintiff from 1856 until 1863, entered into partnership in 1868, and carried on the trade of cloth manufacturers near *Huddersfield*, having a warehouse in that town for the sale of their goods. The bill alleged that for some time past they had been

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using the names "*Turin*," "*Sefton*," "*Leopold*," and "*Liverpool*," to designate cloths manufactured by themselves of patterns similar to Plaintiff's cloths, though of inferior quality, and had sold cloths so manufactured by them under the names used by Plaintiff for designating his cloths, and that Defendants had also adopted the same numbers as were used by Plaintiff, and in the same way, for distinguishing the colours of their cloths. The bill further stated that Plaintiff had also recently (March, 1872) discovered that the Defendants had caused to be printed, and had for some time past been using, tickets precisely similar to the tickets so used by him, except that the Defendants' tickets were slightly different in size, and that the word "colour" was not printed thereon, but written in with ink; and that Defendants had affixed to the cloths manufactured and sold by them tickets resembling the Plaintiff's tickets, and filled in with the names adopted by Plaintiff to designate his goods, and with numbers identical with those used by Plaintiff to distinguish colours of his cloths, which Defendants used for the same purpose; and that by means of such names and the use of the tickets Defendants were enabled to pass off their goods as goods of Plaintiff's manufacture, and that the use of such names and tickets was calculated to deceive, and in some instances had deceived, drapers, tailors, and others who were the ultimate purchasers of the Defendants' goods, into the belief that such goods were in fact goods manufactured by Plaintiff.

According to the evidence in support of Plaintiff's case, the cloths known in the trade by the names of "*Turin*," "*Sefton*," "*Leopold*," and "*Liverpool*," commanded a very large and extensive sale throughout *Great Britain*, and ever since the time they were first made by Plaintiff had been known and distinguished by the above names exclusively, not only in the Plaintiff's mills and warehouse, but by the merchants who purchased from him, and also by tailors and clothiers throughout the kingdom; and all ordinary merchants in purchasing a piece of *Turin* would take it for granted they were purchasing the cloth of the Plaintiff bearing that name. The application of names to cloths was stated to be not a common thing with manufacturers, but to be a speciality with Plaintiff, whose cloths were known by their names and in no other way. Evidence was also given of the inferior quality of the

cloths made and sold by Defendants under the above names, and that the cloths made by Plaintiff and those made by Defendants were so similar in appearance "that ordinary tailors and clothiers might well purchase the cloth of the Defendants supposing it to be the cloth of Plaintiff; and any of these persons having been in the habit of purchasing the Plaintiff's cloths, and knowing them by their names, would take and accept the cloths of the Defendants, sold under the same names, and conclude that they were procuring cloths made by Plaintiff." Close examination would sometimes be necessary to detect the difference between the cloths of Plaintiff and Defendants, which arose in the difference of the material used in the manufacture. It was also alleged in the bill and stated in evidence, that by means of the said names and the use of the said tickets, Defendants were enabled to pass off their goods, and to get them into the hands of retail purchasers as goods of Plaintiff's manufacture, and that the use of the names and tickets was calculated to deceive, and in some instances had deceived, drapers, tailors, and others, who were the ultimate purchasers of Defendants' goods, into the belief that such goods were in fact goods manufactured by Plaintiff.

The case made on behalf of the Defendants was, in substance, that the names which Plaintiff had adopted for his goods merely described the patterns of the manufacture, in which patterns Plaintiff neither had nor claimed any exclusive right or property; that the names having been by Plaintiff conferred upon the thing manufactured, became *publici juris;* and that, by the custom of the trade as well as by law, the Defendants, being entitled to use the patterns, were also entitled to use the names by which those patterns were designated. They denied that by means of the tickets or otherwise Plaintiff had acquired any distinctive trade mark. They also denied that by such use as they had made of the tickets employed by them, they had intended to imitate, or had in fact imitated, the tickets used by Plaintiff; and they positively denied any intention of injuring Plaintiff in his trade, or any other than the lawful intention of competing with him fairly and openly in the manufacture and trade in which he and they were engaged.

In his affidavit the Defendant *Dearnley* stated, that at the time

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he left Plaintiff's service (in 1863) the patterns known as "*Turin*" and "*Sefton*" were public property, and the several firms with whom he had since been connected sold these cloths under these names freely, openly, and as of right; and especially Messrs. *J. Heap & Brothers*, into whose service Defendant entered immediately on leaving Plaintiff's service, sold in large quantities whilst he was with them (a period of two years) the cloths called "*Turin*" and "*Sefton*," and applied those names to them. The names "*Turin*" and "*Sefton*," as applied to two of the patterns of cloth, had been in common and general use in the trade ever since Defendants commenced business together; and for all that time they had been making and selling these cloths openly and of right under those names. Other manufacturers had done the same.

According to the common usage of the cloth trade, all the patterns and styles of cloth introduced into the market by the various fancy cloth manufacturers were, unless protected by a declared and published registration and trade-mark, considered public property as soon as they appeared in the market. If any pattern was introduced by any name, that name was, as a matter of course, used and adopted by all who chose in following the pattern. If a pattern became a favourite one, it was copied by the trade extensively and in all qualities; thus the names grew into common use, and no exclusive right to, or property in, them had, so far as Defendants could ascertain, been recognised in the trade. Instances were given of various names given by Defendants themselves to patterns, well knowing that if any one of the patterns so called became popular, the name would be adopted by every one who chose to manufacture it. It was not by the mere name of a cloth that it gained a good position in the market, but either by the name and reputation of the manufacturer, or by the style and merit of the cloth itself.

The Defendants also denied that, in carrying on their business, they had attempted, or authorized, or been cognizant of, any attempts to pass off cloths manufactured by them as being cloths manufactured by Plaintiff, and insisted that the imputation to that effect made by the bill was wholly untrue. They also denied that their goods were of inferior quality to those of Plaintiff, and stated that they were in the habit of selling them, not to ignorant

or unskilled persons, but to skilled and shrewd buyers, members of, or employed by, wholesale houses, who could not be deceived or misled by any mere name of the cloth or style of the ticket attached thereto. With respect to the tickets, the Defendants' goods were at first disposed of to one merchant exclusively, or nearly so; and until that arrangement came to an end they were not in the habit of using tickets. When they commenced an open trade, and it became necessary to ticket their goods, they applied to a stationer in *Huddersfield*, and selected from his stock a ticket, which they had since used openly and as of right, and entirely without reference to the style or design of ticket used by Plaintiff, and without any knowledge that he had adopted or was using a similar ticket.

Amongst other affidavits on behalf of Defendants was one by Mr. *Wright Mellor*, Mayor and President of the Chamber of Commerce of *Huddersfield*, and engaged in business as a cloth manufacturer and a merchant. He stated:—

"It is a common practice in the woollen trade for newly-introduced styles or patterns of cloth to have distinguishing names given to them, either by the first makers, or by merchants soon afterwards, and as the style or pattern becomes known the name is adopted and comes into general use in the trade. I have in my experience known many distinguishing names of cloth to be introduced and grow into common use in this way—such as '*Tweeds*,' '*Meltons*,' '*Presidents*,' '*Doeskins*,' '*Cheviots*,' and numerous others—but no property or exclusive right to such names is ever considered to attach to the original maker, nor have these names any special application to any individual manufacturer, unless his own name is connected therewith. The terms '*Turin*' and '*Sefton*' are known names in the trade, and have been in growing use for some years past. They do not, so far as I know, apply to the Plaintiff's manufacture in particular, unless his name is added, but to the cloths of that description by whomsoever made. It is well known that other persons besides the Plaintiff are makers of such cloths. I have read the paragraphs in the Plaintiff's bill asserting his claim to the exclusive use of the words '*Turin*,' '*Sefton*,' '*Liverpool*,' and '*Leopold*,' as distinguishing names of his cloths; and I say, speaking from a long experience of the woollen cloth

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trade, that such claim is quite inconsistent with the general practice and usage of such trade."

There were fourteen other affidavits by persons engaged in, and well acquainted with, the woollen trade, to the same effect, denying that manufacturers, by giving fancy names to their manufactures, have thereby acquired an exclusive right to the use of such names, and denying that such names as Plaintiff uses constitute or can be considered as being a trade-mark. Evidence was also given that *Turin* and *Sefton* cloths had been for some years made and sold under those names by several manufacturers besides Plaintiff and Defendants, and especially by a manufacturer of *Huddersfield* named *Brook*, for the last six or seven years quite openly.

The Plaintiff had filed affidavits in reply, in which he stated, that, until he read the affidavits on behalf of the Defendants he never heard of the use of the names "*Turin*," "*Sefton*," &c., in the manufacture or sale of their goods by the firms mentioned. Had he known of the use of the said names in connection with the manufacture or sale of cloth similar in appearance to his own by any person, he should at once have complained of such use, and have taken steps to prevent the adoption thereof, and in fact had done so now. In answer to the statements of Mr. *Mellor* and others as to the common right to use these names from the variety of names, such as "*Cheviot*," which were used as of common right, it was alleged that those names ("*Cheviot*," &c.) were in no way descriptive of any particular cloths, or of the mark of any manufacturer, but were simply descriptive of large classes of goods made all over the woollen market in all kinds of styles, designs, and colours, and had no analogy or parallel whatever to the names given by Plaintiff to his cloths—such names being descriptive, not of any classes of goods, but only of specific goods, and relating to the one article to which such names have been respectively applied. It was also explained that the Plaintiff had not applied his own name to the patterns from the objections entertained by merchants to such a course.

Mr. *Kay*, Q.C., Mr. *Theodore Aston*, Q.C., and Mr. *Davey*, for Plaintiff, in support of the motion, cited *Southern* v. *Howe* (1);

(1) Cro. Jac. 468, 471; Popham, 143.

Croft v. *Day* (1); *Sykes* v. *Sykes* (2); *Edelsten* v. *Edelsten* (3); *Millington* v. *Fox* (4); *Glenny* v. *Smith* (5); *Braham* v. *Bustard* (6); *M'Andrew* v. *Bassett* (7); *Kinahan* v. *Bolton* (8); *James* v. *James* (9); *Farina* v. *Silverlock* (10); *Lee* v. *Haley* (11); *Ford* v. *Foster* (12); *Wotherspoon* v. *Currie* (13); *Ainsworth* v. *Walmsley* (14).

Mr. *Eddis*, Q.C., and Mr. *Bagshawe*, for the Defendants, cited *Canham* v. *Jones* (15); *Liebig's Extract of Meat Company* v. *Hanbury* (16); *Leather Cloth Company* v. *American Leather Cloth Company* (17); *Hall* v. *Barrows* (18); *Burgess* v. *Burgess* (19).

Mr. *W. Druce* watched the case on behalf of certain woollen manufacturers at *Huddersfield*.

June 20. SIR JAMES BACON, V.C., after stating the case and the evidence, continued:—

The facts being so proved (as the Plaintiff has alleged them), it remains to be considered whether the relief sought by the Plaintiff is that to which he is entitled. The law upon the subject has been long established. The cases which have been decided have been very numerous, and present a great variety of circumstances. Most, if not all, of these have been referred to and commented upon; but from the first of them (if *Southern* v. *Howe* (20) be the first) to the last, which is *Ford* v. *Foster*, recently before the Lords Justices, it has been held, as well in Courts of Common Law as in Courts of Equity, that when a manufacturer has produced an article of merchandise, calling it by a particular name and vending it with a particular mark, he has acquired an exclusive right to the use of

(1) 7 Beav. 90.
(2) 3 B. & C. 541.
(3) 1 D. J. & S. 185, 203.
(4) 3 My. & Cr. 338.
(5) 2 Dr. & Sm. 476.
(6) 1 H. & M. 447.
(7) 33 L. J. (Ch.) 561.
(8) 15 Ir. Ch. Rep. 75.
(9) Law Rep. 13 Eq. 421.
(10) 1 K. & J. 509, 515; 4 K. & J. 650.
(11) Law Rep. 5 Ch. 155.
(12) Ibid. 7 Ch. 611.
(13) Ibid. 5 H. L. 508.
(14) Ibid. 1 Eq. 518.
(15) 2 V. & B. 218.
(16) 17 L. T. (N. S.) 298.
(17) 4 D. J. & S. 137; 11 H. L. C. 523.
(18) 33 L. J. (Ch.) 204.
(19) 3 D. M. & G. 896.
(20) Popham, 144.

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such name and mark, which becomes what is usually called his trade mark, and is entitled to prevent all other persons from using such name and mark to denote articles of a similar kind and appearance; and to this must be added, that if the use of such name and mark by any other person than the first inventor has been adopted for the purpose of selling goods of an inferior quality though of similar external appearance, or whereby purchasers may be misled into the belief that they are buying the goods of the original inventor, the injury done to the first inventor is one for which he is entitled to compensation at common law and to relief by way of injunction in equity. In this case it is not disputed that the Plaintiff is the first inventor of the patterns of three of the four descriptions of cloth which have been mentioned; that he for the first time called each of the four by a new distinctive appellative, by which they have become known in the trade as his manufacture; that he has sold all such as he has sold by those names; each bale being accompanied by a ticket on which is written the name by which he had first designated each of the several articles; and that by the name and the ticket the commodities are known by the purchasers, and are known to be of the Plaintiff's manufacture.

The Defendants have insisted, and several of their witnesses have stated, that the invention and use of the names by the Plaintiff confers upon him no such exclusive right as he claims; for that the patterns not having been registered, it became, as it undoubtedly did, the right of any one to copy or imitate the patterns; and that the right to call the commodity by the only name which had been given to it was inseparable from the right to use the patterns, and therefore that the Plaintiff had no right to restrain the Defendants from using the name. And it was said by several witnesses for the Defendants that it is the common usage and custom of the trade, when a like commodity has come to be known by any particular appellation, for any manufacturers who are so minded to manufacture the commodity and to call it by the name by which it has come to be known; and upon this topic reference was made to several articles of manufacture, such as "*Melton*" and "*Doeskin*" and the like, the names being *publici juris* as soon as they are bestowed upon the articles to which they are applied. Without

stopping to consider the validity of any such supposed custom of trade, I think the principle contended for has no application to the present case; for in the instances referred to, as is explained in one of the affidavits I have mentioned, the names refer, not to patterns, but to a general description of goods.

Instances were adduced by Defendants of two of the articles, "*Turin*" and "*Sefton*," made and claimed by the Plaintiff, having been made by other manufacturers, and called by the same names, without objection on the part of the Plaintiff; and upon this it was insisted that he had abandoned or lost, even if he ever possessed, all exclusive right to the names. There are, however, only three manufacturers named who are said to have thus acted. Two of them—Mr. *Crowther* and the manager of Mr. *Brown*—say they have done so for several years past. The third is a Mr. *Heap*, who, however, has not made an affidavit, and who, it would appear, did not make any such goods until after Defendant *Dearnley* entered his service, having been previously employed in the Plaintiff's, and having become acquainted with the particulars of the Plaintiff's manufacture. The Plaintiff has, moreover, stated explicitly that he never heard or knew of the adoption by any person of the names he claims until shortly before the commencement of the present suit, and that as soon as he did know of it he took steps to prevent it; and no attempt has been made to dispute his statement in this respect; and however this may have been, none of the witnesses say that the commodities made by them were distinguished by tickets, or in any other manner, so that by any possibility the goods made by them could be mistaken for those in which the Plaintiff was known to deal. But it is not by the names alone that the identity of the Plaintiff's goods is preserved. For the purpose of preserving that identity he employs a ticket which is proved to be of an original design, in which is written by the Plaintiff the name of the commodity, which is affixed to the goods themselves, and which is used as and meant to be the mark by which in his trade he announces the name and colour and quality of his goods, and becomes responsible, as between himself and the persons with whom he deals, for the particulars inscribed on the ticket. The Defendants use for the like purposes a ticket very closely resembling that of the Plaintiff. The Defendants say this

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ticket was selected by the Defendant *Dearnley* from the stock of a stationer at *Huddersfield*, who says that he made the ticket for an Irish firm, which he does not name. The former employment of the Defendant *Dearnley* in the Plaintiff's manufactory suggests to the Plaintiff and some of his witnesses that this selection could not be accidental. The Defendant *Dearnley* says the nature of his employment by the Plaintiff did not make him acquainted with the tickets then used, his department being the manufacture in a mill distant from the warehouse, and the tickets being affixed to the bales when finished, and in the latter place; and, not admitting that he had ever seen the Plaintiff's tickets, he says that if he had ever done so he had wholly forgotten it at the time when he bought the tickets he uses. I do not lay any stress upon such contradiction as is given by the Plaintiff's witnesses to this part of Mr. *Dearnley's* statement; but, taking it to be as he says, I cannot admit it as an excuse for the adoption by the Defendants of a ticket so closely resembling that of the Plaintiff which is used by them as well as by the Plaintiffs as a trade-mark, and as the only trade-mark used by either of them. The observations of the Lord Chancellor in *Wotherspoon* v. *Currie* (1) seem to have a very direct application to this part of the case. His Lordship, speaking of the similarity of the packets of starch made and sold by the Defendant to those in use by the Plaintiff, says (2): "When there is so much general similarity, it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations, so that persons do not look at the shape of the packet, or at any other *indicia* of the packet than the particular distinguishing mark (in this case the name of the man or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct."

The particular facts in the starch case, *Wotherspoon* v. *Currie*, and in the present, are different, but the principle of the decision is the same, and must be applied to this case if the result leads to the conclusion which was drawn in that case, "that the public might be led to believe while they buy the defendant's goods, that they are buying an article manufactured by plaintiff in conse-

(1) Law Rep. 5 H. L. 508. (2) Law Rep. 5 H. L. 514.

quence of a name (*Glenfield*) being used, the celebrity of which was first acquired by its being applied to plaintiff's manufacture, which of course they think it continues to be."

The Plaintiff in that case had manufactured and sold starch. There was nothing in the nature of the manufacture which could give the Plaintiff any exclusive right to such manufacture, but he had bestowed upon it a name by which he sought to distinguish the starch made by him from the starch made by other manufacturers, and by that name his commodity was sold and known. The Defendant had adopted the same name, and had sold his starch made up in packets the external appearance of which resembled those used by the Plaintiff; and although this fact is mentioned in the judgment, and observed upon as casting some doubt upon the good faith of the Defendant, the principal ground of the decision I take to be that the use of the name "*Glenfield*" was the wrongful act from the continuance and repetition of which the defendant was restrained. And that this was so appears from the observations made by Lord *Westbury* on the same occasion, who said (1): "I take it to be clear, from the evidence, that, long antecedently to the operations of the Defendant, the word '*Glenfield*' had acquired a secondary signification or meaning in connection with a particular manufacture—in short it had become the trade denomination of the starch made by the Plaintiff. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary meaning to which I have referred. The word '*Glenfield*,' therefore, as a denomination of starch, had become the property of the Plaintiff. It was his right and title in connection with starch." Then, is the use made by the Defendants of the names of the Plaintiff's cloths, and the form and manner in which the Defendant's cloths are sold, likely to deceive purchasers, and to lead them in buying the Defendant's cloths to suppose that they are buying those of the Plaintiff? I have referred to the evidence on this point, but even without that evidence I think it is apparent that such must be the result. It is not possible that the merchants who deal wholesale with the Defendants can be misled. They purchase directly from the Defendants, and know what they are doing. But the tailor or other retail dealer

(1) Page 521.

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who, having become acquainted with the name and quality of the Plaintiff's cloths, and desiring further supplies of the same and no other—if he goes to the merchant and asks for what he wants by the only name he knows of, and sees lying before him two bales of cloth, similar in all external appearance, with tickets attached to them (if the merchant had suffered such tickets to remain attached, which seems not always to be the case) so nearly alike that the difference could only be perceived upon a very minute examination, and not possessing such skill and experience as would enable him to detect any difference in the quality of the goods by merely looking at them, would unquestionably be liable to be disappointed and deceived. The temptation of the lower price would not unnaturally induce him to select the Defendants' cloths, which are, I think, upon the evidence as it now stands, shewn to be of quality inferior to the Plaintiff's, and thus the retail dealer would find himself possessed of cloth in the manufacture of which *Mungo* had been used, while he thought he was acquiring the cloth of the Plaintiff, which is composed of wool only. The wear of the article might ultimately convince him of the mistake he had made; but in the meantime the Plaintiff's reputation and his trade would be damaged.

I am, therefore, of opinion, that the Plaintiff has established such a right to the exclusive use of the names by which, and the tickets with which, he has for years past sold his goods; that the Defendants cannot be permitted further to use those names or tickets so closely resembling those of the Plaintiff. It has been said on the part of Defendants, that it would not be right to grant an interlocutory injunction, because the consequences of that would be to stop, or at any rate to interfere prejudicially with, their trade. If the injunction is the right of the Plaintiff, I do not think it ought to be withheld from him upon any such consideration. But I am far from thinking that it would necessarily have any such effect as the Defendants suggest. Their trade need not be in any degree intercepted, although they are debarred from using the names and tickets in question, while, on the other hand, the prejudice to Plaintiff might be very great if the Defendants are permitted to sell at lower prices goods of inferior quality, but of the same name and externally resembling those of the Plaintiff, by which he has

established an extensive trade and reputation. I think, therefore, that the injunction as prayed for must issue.

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Solicitors: Messrs. *Learoyd & Learoyd;* Messrs. *Van Saudau & Cumming;* Messrs. *Edwards, Layton, & Jaques.*

GUMM *v.* HALLETT.

V.-C. B. 1872 *March* 8.

[1870 G. 52.]

Arbitration—Common Law Procedure Act, 1854, *s.* 13.

The provisions of the *Common Law Procedure Act*, 1854, s. 13, that where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint his arbitrator to act alone, and an award made by such arbitrator shall be binding on both parties, do not apply where the reference is to three arbitrators, one to be appointed by each of the parties thereto, and the third to be chosen by the two so appointed.

THIS was an application by summons, on behalf of the inspectors of *Tait & Co.*, to vary the Chief Clerk's certificate, dated the 31st of July, 1871, by inserting therein as a debt their claim for the sum of £634 10*s.* 10*d.*, and for interest thereon at 4 per cent. per annum from the 12th of July, 1864.

The claim arose under an award made on the 12th of July, 1869, by *Henry E. Moss* in an arbitration between the testator, *Charles Gumm*, owner of the steamship *Union*, and the charterers, Messrs. *Tait & Co.* By the terms of the charterparty entered into the 29th of May, 1868, Messrs. *Tait* agreed to hire the ship for a round voyage from *London* to *Antwerp, Falmouth, St. Vincent, Rio Janeiro*, and *Buenos Ayres*. It was provided by the charterparty that, "should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to three persons at *London* or *Liverpool*, one to be appointed by each of the parties hereto, and the third by the two so chosen. Their decision, or any two of them, shall be final, and, for the purposes of enforcing any award, this agreement may be made a rule of Court."

A dispute arose between the owners and the charterers under the charterparty, and on the 8th of April, 1869, Messrs. *Tait & Co.* appointed *Moss* to be their arbitrator, and gave notice to *Gumm*

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by letter, of the appointment, requiring him to appoint an arbitrator to act for him, and that in default of his appointing within seven days after service of the notice an arbitrator to act for him, they would appoint *Moss* to act as sole arbitrator, and that his award would be binding upon them. *Gumm* did not appoint an arbitrator, nor did he appear at the reference which was carried on by *Moss*, who was, pursuant to the notice, appointed sole arbitrator by *Tait & Co.* On the 12th of July, 1869, *Moss* made his award, by which the sum of £634 10*s.* 10*d.* was awarded to be paid by *Gumm* to *Tait & Co.* as damages for his non-fulfilment and breach of the charterparty.

Gumm having died, a suit was instituted for the administration of his estate, and a claim having been carried in on behalf of *Tait & Co.* (who had executed a deed of inspectorship) to obtain payment of the amount so awarded to them, the question upon the present summons to vary the Chief Clerk's certificate was, whether, having regard to the *Common Law Procedure Act*, 1854, s. 13, the award by one arbitrator only was valid.

Mr. *Little*, Q.C., and Mr. *H. M. Jackson*, in support of the claim, contended that, under sect. 13, where one party failed to appoint an arbitrator the other party might appoint his arbitrator to act alone, and an award made by him would be binding.

Mr. *Kay*, Q.C., and Mr. *Charles Hall, contrà*, submitted that the case did not fall within sect. 13. They cited *Bos* v. *Helsham* (1).

SIR JAMES BACON, V.C., was of opinion that the case did not fall within the provisions of the *Common Law Procedure Act*, 1854, which did not apply where, as here, the contract between the parties was that matters in dispute should be referred to three arbitrators. The award was inoperative, and the summons to vary the certificate must be refused with costs; but he directed the sum of £634 10*s.* 10*d.* to be carried over to a suspense account to meet the claim of *Tait & Co.*, in case they were able to establish it independently of the award.

Solicitors: Messrs. *Simpson & Cullingford;* Messrs. *Lawford & Waterhouse.*

(1) Law Rep. 2 Ex. 72.

In re TAYLOR'S SETTLED ESTATES.

V.-C. B.
1872
July 18.

Practice—Settled Estates Act—Advertisement of Petition—Cons. Ord. XLI., *Rule* 20—*Married Woman—Examination.*

A Petition under the *Settled Estates Act* was allowed to be placed in the paper for the last petition day before the long vacation, although the twenty-one days from the last advertisement prescribed by Cons. Order XLI., r. 20, would not then have expired.

The examination of a married woman, one of the Petitioners, was ordered to be taken in Court when the Petition came on to be heard.

THIS was an application that a Petition under the *Settled Estates Act*, which was presented on the 25th of June, 1872, might be placed in the paper for hearing on the 27th of July (the last day of petitions before the rising of the Court for the long vacation), although the twenty-one days from the last advertisement of the Petition (the 15th of July) would not then, as required by Cons. Order XLI., r. 20, have expired.

Mr. *Cozens-Hardy*, in support of the application, referred to *Re Adams' Devised Estates* (1) and *Re Bower's Settled Estates* (before Vice-Chancellor *Bacon* on the 14th of July, 1870), in which cases the Petition had been allowed to be heard before the expiration of the twenty-one days, in order to prevent its being thrown over the long vacation. He also asked the direction of the Court as to the attendance of one of the Petitioners, a married woman, for the purpose of taking her examination, under sect. 37 of the *Settled Estates Act*, 1856, and cited *In re Smith's Settlement Trusts* (before Vice-Chancellor *Stuart* on the 10th of May, 1867) and *Re Packer's Settled Estates* (2), as shewing that the examination of a married woman might be taken in Court when the Petition came on to be heard, or at any time before making the order.

SIR JAMES BACON, V.C., following the above-mentioned authorities, gave leave for the Petition to be in the paper for the 27th instant, and directed that the married woman should then be in attendance for the purpose of having her examination taken (3).

Solicitors: Messrs. *Sharpe, Parker, & Co.*

(1) 6 L. T. (N.S.) 604. (2) 39 L. J. (Ch.) 220.
(3) See *In re Townsend's Settled Estates*, *ante*, p. 433.

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[1871 K. 34.]

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[1871 A. 129.]

23 & 24 Vict. c. 34—*Petition of Right—Information—Continuing Trespass—Injunction—Jurisdiction.*

6 Ch D. 523.
6 App Cas 626

A motion in a suit by the Attorney-General for an injunction to restrain a contractor with the Secretary of State for War from continuing on the site of Government land, after notice to quit given under the powers of the contract; and a motion by the contractor (who had presented a Petition of Right) for an injunction to restrain the Secretary of State for War from preventing the Suppliant completing his contract, and from continuing the superintending officer of engineers in the supervision of the works, ordered to stand until the hearing of the suits.

East Lancashire Railway Company v. *Hattersley* (1) considered.

Semble, it is wrong to join any one with the Queen as a Respondent to a Petition of Right; but, *quære*, whether a demurrer would be the correct mode of raising the objection.

Semble, that to an information by the Attorney-General against a contractor praying relief in respect of a contract for works upon land belonging to the War Department, the Secretary of State for War should be party.

Whether, also, the contractor's remedy under the circumstances was by Petition of Right or by bill against the Secretary of State, *quære*.

PETITION OF RIGHT—INFORMATION—MOTIONS.

The first of these suits was commenced by a Petition of Right presented by *John Kirk*, a contractor for public works. The Respondents to it were the Queen and Captain *Percy Smith*, of the Royal Engineers. The Suppliant's object was to be allowed to continue a contract for the construction of barracks and buildings connected therewith at *Garrioch*, near *Glasgow*, made between the Suppliant and the Secretary of State for War, and to obtain payment of the sums due to the Suppliant for works already executed and materials supplied (which payment, he alleged, was unjustly withheld from him chiefly through the perverse and inequitable conduct of Captain *Percy Smith*), and also compensation in damages for breach of the contract by the War Department, and other relief.

In September, 1869, letters were sent out to the Suppliant and

(1) 8 Hare, 72.

other contractors, inviting tenders for the erection of the barracks, accompanied by a "specification of work to be done," and a schedule entitled "Schedules of prices for works." The schedules of prices contained a form of tender and certain terms of contract, schedules of prices of various kinds of work, and both the specification and schedules of prices contained various regulations and stipulations as to work, materials, and other matters relating to the contract. The Suppliant sent in a tender, which, on the 7th of October, 1869, was accepted by the War Office. The contract contained in the schedule of prices was framed in thirty-nine distinct clauses; but the general effect of it (to which alone it is material now to refer) was this: it gave power to the War Office to reject any materials of which it disapproved, or any works which it did not consider of sufficiently high quality. It further enabled the War Office to fix the time within which any proportion of the work was to be completed, and to determine the contract in case of undue delay. All materials and plant brought on the lands by the contractor (except materials which were rejected) were to become the property of the War Office, and to remain so in case of non-completion; but the plant and unused materials were to revert to the contractor when the work was finished.

The Suppliant commenced the works in November, 1869, and continued them till the 20th of July, 1871, under the supervision of Captain *Percy Smith*, the superintending officer of engineers appointed to see that the contract was properly carried out. The Suppliant, however, did not proceed with due diligence at the time and in the manner prescribed by the contract. Repeated warnings were given to him of the consequences which his dilatoriness would involve, but without effect; and ultimately, on the 20th of July, 1871, when about three-fifths of the stipulated time had elapsed, and very little more than one-fifth of the requisite work had been done, notice was given to him to suspend the proceedings and withdraw from the site of the works. He refused to do so, and in August, 1871, presented his Petition of Right. The allegations in it were in substance these:

1. That in the progress of the contract Captain *Smith* by oppressive and inequitable requisitions rendered it impossible for the Suppliant to carry out his contract profitably, or at all.

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2. That Captain *Smith* rejected materials which satisfied the requirements of the specification and schedules.

3. That he required work and materials of higher class than the contract prescribed, without allowing any extra price.

4. That he so adjusted the work as to throw upon the Suppliant a disproportionate quantity of the least remunerative work, without procuring any advantage to the War Department.

5. That he vexatiously and improperly refused to give the Suppliant certificates for works and materials stipulated by the contract, and for additional works ordered.

6. That he refused to make any allowance for work of a kind superior to that required by the specification, although he required such work to a very large extent.

7. That he refused to give the Suppliant adequate certificates in respect of the plant and materials on the ground so as to enable him to receive payment in respect of them under the contract; and that in consequence of such refusal the Suppliant was unable to obtain payment of sums due to him under the contract.

8. That great delay in the works as well as unnecessary expense to the Suppliant had been caused by the conduct which he attributed to Captain *Smith;* and that further great delay had been caused by the neglect of the War Department to supply in sufficient time the detailed plans of the works.

The Suppliant also charged that Captain *Smith* was actuated by a desire to drive him to give up his contract; that Captain *Smith's* conduct "amounted in equity to fraud," and that the War Department had committed a breach of contract. The Suppliant therefore prayed the following relief:

1. An account and payment of what was due to him, under the contract.

2. Damages in respect of the alleged breach of contract by the War Department, and of the requisitions of Captain *Smith.*

3. An injunction to restrain the Secretary of State from determining the contract, and excluding the Suppliant from the site; and,

4. A like injunction against the further employment of Captain *Smith* as superintending engineer, and that Captain *Smith* might pay the costs of the suit.

5. And for further relief.

Captain *Percy Smith*, by his answer to the Petition, denied the Suppliant's charges.

The second suit was commenced by an information filed by the Attorney-General against the Suppliant alone, stating the facts of the case to the above effect, and praying a declaration, that on the 20th of July, 1871, the Defendant had failed to proceed with due diligence at the time and in the manner referred to by the terms of the contract; an injunction to restrain the Suppliant, his agents and workmen, from retaining possession, or continuing or being upon the site of the works, or obstructing the officers of the War Department in taking possession thereof, and from removing from the site any temporary buildings, staging, tramways, fixed machinery, or plant placed thereon, or any materials delivered for the execution of the works (except such materials as the Secretary of State for War might reject); a further declaration that the damages occasioned, or which might be occasioned, by the retention of possession of the site by the Suppliant since the 20th of July, 1871, or by his delays or breaches of contract might be assessed and ordered to be paid, together with the costs of the information, by the Suppliant; and that that injunction might (if and so far as necessary) be treated as a cross-proceeding to the Petition of Right.

A good deal of evidence was adduced on both sides with respect to the work done, materials supplied, and other matters in dispute between the parties, to which, for the purposes of this report, it is unnecessary more particularly to advert.

The causes came on to be heard upon two motions—

The first, on behalf of the Attorney-General, for an injunction to restrain the Suppliant, his agents and workmen, from retaining possession of, or continuing or being upon the site of the works in the information referred to, or obstructing the officers of the War Department in taking possession thereof.

The second, on behalf of the Suppliant, for an injunction to restrain Her Majesty's principal Secretary of State for War, and the officials of the War Department, from preventing the Suppliant from carrying on the contract the subject of his suit, or excluding him from the site of the works, or interfering with the due completion of the contract; and that the Secretary of State for War

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and the officials of the War Department might in like manner be restrained from further employing the Respondent, Captain *Percy Smith*, as the superintending engineer, or referee under the contract.

The arguments upon the various questions at issue, both of law and fact, were extremely lengthy; and we propose to confine the report to those relating to the law.

A preliminary objection was raised, that the Secretary of State for War ought to have been a party to the information.

The Solicitor-General (Sir *G. Jessel*), and Mr. *G. W. Hemming*, for the Attorney-General:—

If the objection that the Secretary of State for War should have been a party to our information is pressed, we will make him a party by amendment, but he would be a mere formal party, as a trustee in whom the land is vested for the Crown.

[The VICE-CHANCELLOR:—As a general rule, a Secretary of State is an agent for the Crown; but that does not apply to the Secretary of State for War, who is a corporation.]

[After some discussion the objection was waived.]

This, then, is the case of a contractor who, under a licence, has taken possession, and who, under colour of a right, insists on retaining that possession: *East Lancashire Railway Company* v. *Hattersley* (1) is exactly in point, and clearly shews that the Court has jurisdiction to order a person guilty, as the Suppliant here is, of a continuing trespass of this kind, to desist and give up possession of the property to its owners.

Then as to the Suppliant's motion: but for the desire of the Crown to fully meet his case, a general demurrer would have answered the whole of the Petition. There is absolutely no equity in it. The last paragraph of the prayer, that for general relief, is the only proper one in the whole of the Petition. The specific relief prayed is on alleged torts and for damages. No such relief could be given upon it on the hearing, and none, therefore, can now be afforded. A Petition of Right against the Queen and another Respondent cannot be sustained.

(1) 8 Hare, 72.

The difficulty in the case of *Tobin* v. *The Queen* (1) was this, that the Crown could not be sued for damages; but if both the Crown and the captain of the ship could have been sued, they would have been.

In *Felkin* v. *Lord Herbert* (2) the proceeding was by bill against the War Office, not by Petition of Right.

[THE VICE-CHANCELLOR:—The original theory of a Petition of Right was this: the subject applied to Her Majesty for leave to sue Her Majesty, as he might have sued a subject; and the decision on the Petition of Right only went to say, "Let right be done." Then, it might be done in any way; as, for instance, in *Clayton* v. *Attorney-General* (3), by filing a bill against the Sovereign and a number of subjects. Before the *Petition of Right Act* (23 & 24 Vict. c. 34), the Petition was addressed to the Queen alone; and had this peculiarity, that you had to establish, *ex parte*, a *primâ facie* case, on oath, before the Petition could be heard at all. On a Petition of Right, proper, before the Act, a subject could not have been joined with the Crown. On Petitions of Right, since the Act, bills have been filed against the Attorney-General. *Rolt* v. *Attorney-General* (4) was a Petition of Right first, and then turned into a bill. The result of a Petition of Right was, if successful, that Her Majesty—not with reference to the remedy, but the trial of the right, so to speak—descended from the throne and allowed herself to be sued before her own inferior officers, just as if she were a subject; and proceedings were instituted in the same form; and with the addition of whatever other parties might be necessary, or would be proper if the Queen had been a subject. But it seems to me there is nothing which in the least authorizes the joining of a subject with the Queen as Respondent to the Petition itself. However, if I have jurisdiction, by consent or otherwise, to grant an injunction against the Crown, the fact that Captain *Smith* is unnecessarily or improperly mentioned as a party can hardly oust it, at least in this proceeding. If Captain *Smith* had demurred the case might have been otherwise: though I am inclined to doubt whether, on the whole, a demurrer would be the proper

(1) 14 C. B. (N.S.) 505.
(2) 11 L. T. 173.
(3) C. P. Coop. Rep. in Ch. 97, temp. Cottenham.
(4) Not reported.

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method of raising a fundamental objection to the form of a Petition of Right.]

Sir *Roundell Palmer*, Q.C., Mr. *Morgan*, Q.C., and Mr. *H. M. Jackson*, for the Suppliant:—

This is an attempt of the Attorney-General by an ejectment bill to turn a contractor out of the possession of property legally vested in either the Crown or the Secretary of State for War. They can at any moment enter under this contract, at law, and have therefore no right to come into equity. The *East Lancashire Railway Company* v. *Hattersley* (1) really has no application to this case. The order made in that case involved three elements, viz.: 1. A general submission by the Plaintiffs to account; 2. A waiver by the Defendants of compensation for delay occasioned by the Plaintiffs; and 3. A dispensation with certain parts of the contract which might have been unfavourable to the contractor. None of those elements exist here. He who seeks equity should do equity. The assertion that "the Crown can do no wrong," coupled with the argument as to damages against it, involves—as the shadow implies the light, or the concave implies the convex—if the thing done by or on behalf of the Crown was a wrong, that if the Crown is not answerable for it, some one else is. If, therefore, the Suppliant cannot get any damages on his Petition, he must have a remedy against the Secretary of State for War.

An information of intrusion might possibly lie in this Court, but not on the equity side of it. Such an information is nothing more or less than an action of ejectment by the Crown; and till the proper time comes, you can do nothing. To seek to oust the Suppliant before the hearing of the suit, is certainly not the principle.

Then, as to the Petition of Right. In *Tobin* v. *The Queen* (2) the Court held that the Crown was not responsible, on Petitions of Right, for such torts as were then in question: *The Bankers' Case* (3); *Feather* v. *The Queen* (4); *Churchward* v. *The Queen* (5). But there is nothing in the Act of Parliament which has destroyed the right of a subject to appeal to the Queen in person; and when he

(1) 8 Hare, 72.
(2) 14 C. B. (N.S.) 505
(3) 14 State Trials, 1.
(4) 12 L. T. (N.S.) 114.
(5) Law Rep. 1 Q. B. 173.

has done so, and she has indorsed the Petition "Let right be done," she has waived any objection to his further proceeding on it.

The practice, at law, is certainly to sue the Queen in respect of War Office contracts by Petition of Right. Proceedings in actions at law arising out of such contracts are entitled *The Contractor* v. *The Queen* only. There is no case of this kind in which the Secretary of State for War, as such, has been sued in that capacity. The position of the Secretary of State for *India* is different. But there is nothing which enables the Secretary of State for War to be sued in respect of such contracts as these; which, moreover, are not within the statutes by which the powers of the Secretary of State as a corporation are regulated. They relate only to contracts as to land. This is a contract relating to something to be put, or done, on the land. Suppose the Secretary of State for War could be sued, and suppose he died, *pendente lite?*

[The VICE-CHANCELLOR:—In *Felkin* v. *Lord Herbert* (1) the Secretary for War did die, and a new one was substituted. So here, I presume, Mr. *Cardwell* might sue as a corporation on this contract. If suing as a corporation, he ceased to be Secretary of State for War, or if he died, the new Secretary of State for War would take up the proceedings without any formal revivor.]

The contract into which the Secretary of State enters in these cases is not for his own benefit, and there is not the correlative right of suing and of being sued; only the right of suing.

The Legislature might have given that right, but has not done so, although it did so in the case of the Secretary of State for *India*. We should have been only too glad to have proceeded by bill instead of by a Petition of Right, had such a course appeared proper. The only result of the contract, so far as the Secretary of State for War is concerned, is to bind the Queen. He is simply her agent for all the purposes of the Act.

[The VICE-CHANCELLOR:—In this Court the Secretary at War has sued and been sued. There may have been more or less consent, but he has been sued and has sued like any other suitor.]

(1) 11 L. T. 173.

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We have done all we could to find a precedent for a writ of *amoveas manus*, and cannot. Whether it was directed to the sheriff, or how it ran, we do not know. *Chitty's* Treatise of the Prerogative of the Crown (1) shews only that the judgment, if against the Crown, on a Petition of Right—a *Petition de Droit*, or *Monstrans de Droit*—was that of "*ouster le main*," or *amoveas manus*, viz., *quod manus domini Regis amoveantur, et possessio restituetur petenti, salvo jure dominis Regis.* By that judgment the Crown is instantly out of possession; so that there needs not (as *Blackstone* says) the indecent interposition of its own officers to transfer the seisin from the King to the party aggrieved. Then, further, we say Captain *Smith* is properly made a party to the Petition. Of course to have prayed relief from or against him would have been an obvious fallacy; but the Petition merely prays such relief against him as we think his conduct towards the Suppliant entitles him to ask, and as might have been asked between subject and subject on a bill filed.

[The following authorities were also cited in the course of the argument for the Suppliant: *Rolt* v. *Attorney-General* (2); *Deere* v. *Guest* (3); 5 & 6 Vict. c. 94; 18 & 19 Vict. c. 117; 21 & 22 Vict. c. 58; *Kimberley* v. *Dick* (4); *Scott* v. *Corporation of Liverpool* (5); *Pawley* v. *Turnbull* (6); *Bliss* v. *Smith* (7): *Ormes* v. *Beadel* (8); *Addison* on Contracts (9); *Kemp* v. *Rose* (10)].

The VICE-CHANCELLOR:—Mr. Solicitor-General, I do not want to hear you on the question of Mr. *Kirk's* motion. I am quite clear I can make no order on that. But I want to hear you on the question whether I can make an order on your own motion.

The *Solicitor-General*, in reply:—

This is not a case of continual trespass under the colour of a right; and it is the constant practice of this Court to relieve in such instances by injunction. That is reasonable; because, while damages may be sufficient recompense for a single trespass, and

(1) Pages 345, 356.
(2) Not reported.
(3) 1 My. & Cr. 516.
(4) Law Rep. 13 Eq. 1.
(5) 3 De G. & J. 334–363. 5 Jur. N.S. 105
(6) 3 Giff. 70. 7 Jur. N.S. 792.
(7) 34 Beav. 508.
(8) 2 Giff. 166. 6 Jur. N.S. 550
(9) Last edit. p. 389.
(10) 1 Giff. 258. 4 Jur. N.S. 920

induce the trespasser to refrain for the future, what is desired in the other case is to stop the repetition of the act. Those considerations, therefore, get rid of the whole difficulty as to the jurisdiction of this Court.

The *East Lancashire Railway Company* v. *Hattersley* (1) is, from that point of view, precisely parallel with this case. The injury to the Government in not having its barracks completed is exactly the same in kind—in specie—as the injury to a railway company in not getting its line completed. The one wants the railway for the purpose of carrying the public; the other wants the barracks for the purpose of housing the troops. The difficulty in that case was greater than in this, because at that time the Plaintiffs could not have got an injunction (as can now be obtained) at law. In this case it is impossible to ascertain the injury to the Government, but it would be a source of great regret if this Court should come to the conclusion that it has only one way of recovering possession, viz., by force—by the aid of a body of sappers and miners. Suppose the trespass were committed, not by the contractor continuing on the site after notice to quit, but by another party, pending the continuance of the works; can any one doubt that the owner would have a right, not wishing to employ force, to invoke the aid of this Court? To give the Crown the possession of its own property cannot, in this instance, hurt the contractor, because he will be paid all that is due to him; and (as I am not called on to answer his motion) he is not now in a position to allege any ground for preventing the War Office from determining the contract.

But one word as to the Petition of Right. This case is either fraud, or it is nothing. It is a tort. As I understand the decisions, they come to this, you cannot sue the Crown in respect of tort. You can sue a servant or agent of the Crown. The Crown can commit no wrong. If anybody commits a wrong it is not by command of the Queen. Consequently, if you sue the agent who has done the wrong, he cannot set up his agency as a justification for committing the wrong. If the Secretary of State has committed a wrong you cannot sue him as a servant of the Queen, but you can sue him as a man who calls himself the servant of the Queen, though he is

(1) 8 Hare, 72.

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acting in another capacity. It is not that the subject is without remedy, but that he cannot sue the Queen. She has not authorized the wrong; she cannot do the wrong; and if any person, alleging himself to be her servant or agent, does a wrong, he is personally and individually liable. Cases of "tort" and "damages for breach of contract" have been often confused. The Crown may perhaps be sued for breach of contract in not accepting goods, but that is not strictly a tort.

Upon the whole of this case we submit that the authorities cited by the other side do not support their case; that the *East Lancashire Railway Company* v. *Hattersley* (1) does support ours; and that we are entitled to the injunction for which we move.

SIR JOHN WICKENS, V.C.:—

This case arises out of a contract between Mr. *Kirk*, an eminent contractor, and the War Office, for the erection of barracks on land near *Glasgow*, which land seems to be vested in the Secretary of State for War.

The contract, which was made in September or October, 1869, is, like most similar contracts, very stringent in its terms. [His Honour here stated the effect of the contract as above, and continued:—]

Now, that the contract is very stringent on the contractor is unquestionable; but in similar contracts large discretionary powers are vested in persons not more trustworthy or disinterested than the War Office, or its advisers; and such contracts are eagerly sought after, and produce—or are understood to produce—large profits to the contractor. At any rate, it is a contract which both parties entered into with their eyes open. This contract the War Office has determined, on the ground of delay.

Mr. *Kirk*, alleging that the delay was caused by the vexatious and unreasonable interference of the officers employed in the War Department, presented a Petition of Right, and now seeks in effect —those are not the terms, but that is the effect—that the War Department notice to determine the contract shall be treated as inoperative; and that he shall be allowed to retain possession of

(1) 8 Hare, 72.

the site and to complete the works. On the other hand, the Attorney-General has filed an information for the purpose in effect of obtaining possession of the site and materials on it, excluding, of course, rejected ones.

Whether the remedy of Mr. *Kirk* (if he is entitled to any relief) should be sought by a Petition of Right or by bill, is a question, I think, of some difficulty. No objection was taken on this ground by the Solicitor-General. Whether the counter proceeding, if necessary, should have been by bill instead of information, is of course a cognate question; although not necessarily the same. On those questions I intimate no opinion.

The relief which Mr. *Kirk* claims (fraud in the strict sense being out of the question) is rested, as I understand, on the ground that the wide powers given by the contract to the War Department have been exercised in an unreasonably and wantonly vexatious way; that to that alone the delay is to be attributed; that the Court could therefore give relief at the hearing; and will at least keep things *in statu quo* until the right to that relief can be properly decided.

No doubt the Court has assumed jurisdiction in certain cases to control the unreasonable, but not fraudulent, exercise of the discretion given by a contract, absolute in its terms. It is difficult, however, not to feel that the exercise of such a jurisdiction for any purposes, except that of fixing a sum of money to be paid to the person aggrieved, may involve very great difficulties.

The present case may be taken as illustrating this:—Supposing the Court to determine that the contract is to go on, the future relations of the War Office and the contractor would be singularly difficult to define. The decision must be that they are not to be bound by the letter of the contract but by the spirit of it. But how can that be laid down so as to afford a rule for solving difficulties when they arise? The impossibility of expressing such an order in any definite terms, or of preventing it from working unfairly, if indeed it could be made to work at all, affords a strong reason against making it.

But in truth the contractor's case fails on the merits. A great portion of Mr. *Kirk's* complaint is, in fact, that he has not been allowed to deviate from the terms of the contract when he thinks

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it would have been reasonable and fair, according to the ordinary course of business, to let him do so. So another large part of them is founded on the alleged ignorance, and what may be called the martinetship, of the officer deputed by the War Office to superintend the works; and his consequent error of judgment. Supposing all those allegations proved, they afford no ground for the Court's interference for such a purpose as this. And if they are put out of sight, the delay on the part of the contractor, which has unquestionably occurred, is not justified; even if he has other minor grounds of complaint on which he is right. This I say, not as meaning that he has established any real ground for the equitable interference of the Court upon any part of the case, but to avoid discussing the evidence in detail on the minor parts of it.

It seems, therefore, that on the merits as now before me, Mr. *Kirk's* motion fails; but I propose that it should not be dismissed, but should stand to the hearing.

There may be a little more difficulty in dealing with the Attorney-General's motion; but I think on the whole the case is not one in which the Court should interfere. The case of *East Lancashire Railway Company* v. *Hattersley* (1), the only authority which was cited for it, seems, I agree with Sir *Roundell Palmer*, to have proceeded to some extent on the consent or submission of the parties. It is not at all clear to me that the Vice-Chancellor *Wigram* would or could have made any order on it, if the parties had stood on their extreme rights; and there was at least consent enough to make an appeal impossible. Moreover it was a single case; and a part of the reasoning in the judgment was, I think, not unfairly criticised by Sir *Roundell Palmer*. It was, no doubt, suggested by the Solicitor-General that this is a trespass in respect of which the Courts of Law would, in the existing state of the law, grant an injunction in an action of trespass. The mere fact that it is a continuing trespass, in the sense in which this is a continuing trespass, seems to me in no way conclusive; and I should observe that the power of the Courts of Law to grant an injunction in a case of this sort, is rather against than in favour of the supposition, that the Court of Chancery has the jurisdiction. Certainly I decline for the first time to hold that

(1) 8 Hare, 72.

there is such a jurisdiction; though I entirely agree with the Solicitor-General that it would be very convenient, and that it would be very much better if the Court had it.

It was suggested, but I think not very strongly relied upon, that the Crown, if it could get an injunction at law, might have a right to it in this Court, even if the subject had not. But independently of other considerations into which I do not go on the subject, I should observe that, in the present case, the Crown is only a *cestui que trust*, coming into this Court as a *cestui que trust*, whose trustee does not refuse to sue, but who for some reason or other prefers to sue in his own character. The trespass, as I imagine, is a trespass upon land vested in the Secretary of State for War, and the proper subject of an action of trespass by him, and there seems some difficulty in extending the prerogative in question to such a case.

On the whole, thinking as I do that it would be in many respects more convenient if I could grant an injunction instead of leaving things alone, I propose simply to make on the Solicitor-General's motion the same order that I do upon Mr. *Kirk's* motion, namely, that it should stand to the hearing.

The *Solicitor-General*:—If the Crown resumes possession, will your Honour consider it as acting contrary to your judgment?

The VICE-CHANCELLOR:—The meaning of my judgment is that the Crown is at liberty to resume possession.

Solicitor for the Attorney-General: Mr. *John Clulow*.
Solicitor for the Suppliant: Mr. *S. T. Clarke*.

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1871

July 15, 17, 18.

WILLESFORD *v.* WATSON.

[1870 W. 190.]

Common Law Procedure Act, s. 11—*Mining Lease—Arbitration Clause—Bill for Injunction—Order of Reference.*

The *Common Law Procedure Act* (17 & 18 Vict. c. 125) ought to receive a liberal interpretation in Courts of Equity; therefore, where a mining lease contained a clause that whenever any dispute should arise touching, *inter alia*, the working of the mine, or compensation to be paid, or anything to be done under the covenant, or touching the rights or duties of either party, the matter in difference should be referred to two arbitrators or their umpire in conformity with the Act (17 & 18 Vict. c. 125), the Court, under the 11th section, on the Defendant's motion, stayed proceedings on a bill filed by the lessors praying for an injunction to restain workings alleged to be improper, and an account, and directed a reference.

By an indenture of lease, dated the 25th of April, 1866, the Plaintiffs, who are tenants in common of a certain estate in *Devon*, called *Capel Tor*, demised to the three Defendants all the mines and minerals under the estate, and the buildings on the estate, and certain land in use and paid for by the former lessees of the mines, with liberty to dig and sink shafts, to take stone, divert water as should be necessary to work the mines, yielding a royalty of one-fifteenth of the money value of the produce when sold. The lease contained the following arbitration clause:—

"Provided always, and it is hereby agreed and declared, that if and whenever any dispute, question, or difference shall arise between the said parties to these presents, or their respective executors, administrators, or assigns, touching any dues or moneys payable or retainable under these presents, or the price to be paid for any engine, machine, or apparatus taken by the lessors, their heirs or assigns, in pursuance of the provisions in that behalf hereinbefore contained, or touching these presents, or any clause or matter or thing herein contained, or the construction hereof, or the working of the said mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessors herein contained, or touching the rights, duties, and liabilities of either party in connection with the premises, the matter in difference shall be referred to two arbitrators, or their umpire, pursuant to, and so as in all respects to conform

to the provisions in that behalf contained in the *Common Law Procedure Act*, 1854."

The lease was taken by the Defendants as trustees for a large number of adventurers, by whom the mine was worked on the cost-book principle. The same Defendants were also, at the date of the lease, the lessees of other mines, the property of Lord *Fortescue*, which were contiguous to the Plaintiffs' mines. It appeared that the Defendants, shortly after their lease from the Plaintiffs, sunk the shaft through the Plaintiffs' land in a slanting direction into the adjoining land, and made use of it not only to work the mine under Plaintiffs' land, but also to bring the minerals and refuse from Lord *Fortescue's* land into the Plaintiffs' land, and thence to raise it. The Plaintiffs, on discovering this fact, objected, but expressed themselves willing to grant a licence, and to do all other acts on payment of a reasonable and proper way-leave and compensation for the use of dressing-floors and deposit and heap room. This the Defendants refused to pay, and the Plaintiffs thereupon filed this bill to restrain the Defendants from conveying any substance from the adjoining lands into the *Capel Tor* estate, or from leaving any tramway open, without the Plaintiffs' consent, for the purpose of enabling the Defendants to work any mines not comprised in the lease granted by the Plaintiffs.

Two of the Defendants then took out a summons to stay proceedings and to refer the matters in dispute to arbitration, under the *Common Law Procedure Act*, s. 11. The summons was adjourned into Court.

Mr. *Dickinson*, Q.C., Mr. *Charles Hall*, and Mr. *Romer*, for the summons:—

No order has yet been made in these Courts under this section of the statute, but a suit is expressly mentioned. The case made by the bill is completely covered by the arbitration clause. The bill asks in effect that the Defendants may be restrained from making use of the shaft in the Plaintiffs' land, or of the access to the Plaintiffs' land, for the purpose of working another mine, not on the Plaintiffs' land, but contiguous to it, without the Plaintiffs' consent, and for an account based upon previous user; but the evidence shews that the Plaintiffs have been and are willing that

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the Defendants should do what the injunction seeks to restrain on payment of a sum to be ascertained. This brings the case clearly within the words of the clause, which provides that "when any dispute arises touching the working of the said mines, or any compensation to be paid, or any other thing to be done under the covenants herein contained, or touching the rights, duties, or liabilities of either party in connection with the premises, it shall be referred to arbitration."

The course to be pursued is, as determined by the statute, as follows: the 11th section gives power to stay proceedings; the 12th section goes on to provide what is to be done in case of a failure to appoint arbitrators; and the 13th section provides that where one party has appointed an arbitrator, and the other has omitted to do so, the arbitrator may act as sole arbitrator, subject to the power of the Court to revoke his appointment.

This is just the case contemplated, viz., of two arbitrators; the Defendants have not appointed one, but it may, if necessary, be done at any moment.

It is believed that no order has hitherto been made under this statute by the Equity Courts.

Mr. *Greene*, Q.C., and Mr. *Dunning*, for the Plaintiffs:—

The matters in dispute here do not arise under any covenant in the lease, nor do they in any way touch the working of the mines, or the royalties reserved under the lease. In a word, they have nothing to do with the lease or the rights or duties created by it. They are, therefore, not matters within the arbitration clause.

But the bill deals with questions far beyond the power of any arbitrator. The Plaintiffs say the Defendants are guilty of trespass, and ought to be restrained from repeating their wrongful acts. It makes no offer to allow the acts complained of to be done on receiving compensation. To refer such a case would be to transfer to an arbitrator the jurisdiction of this Court in a matter of legal right. This was certainly not contemplated by the arbitration clause.

But even if the Court has the power to transfer these questions to arbitration, it is not bound to do so under the Act, and if not bound it is not the habit of this Court to do so: *Croskey* v.

European and American Steam Shipping Company (1), and *In re Dare Valley Railway Company* (2).

The VICE-CHANCELLOR :—In *Croskey* v. *European and American Steam Shipping Company* there was no application under the *Common Law Procedure Act*. What the Court did was simply to refuse to change the jurisdiction in a matter of account.

Mr. *Greene* :—In that case the Lord Chancellor stated as his reason, "that questions of law and fact must arise." That is exactly the Plaintiffs' case. We contend that such questions must arise here, and claim the right to have them adjudicated upon by this Court.

In *Witt* v. *Corcoran* (before Vice-Chancellor *Bacon*, June 12th, 1871) the Court granted an injunction to restrain the Plaintiff from proceeding under arbitration.

In this case the deed contains no provision as to the appointment of arbitrators.

They asked that the summons might be dismissed with costs.

Mr. *Dickinson*, in reply :—

Witt v. *Corcoran* has no general application, and was a peculiar case of partnership, and the ground of the decision was that the arbitration was contrary to good faith.

The main point relied on by the Plaintiffs is that the bill asks for an injunction and account; but in *Wheatley* v. *Westminster Brymbo Coal and Coke Company* (3), where the bill asked for an injunction and an account, Vice-Chancellor *Kindersley* was clearly of opinion that the case was within the 11th section of the Act, though for reasons special to that case he did not refer it. In this case the subject-matter is essentially one which, if it were before a Court of Law, would certainly be referred.

In such a case as this the Court would never grant an injunction till the hearing, and when the arbitrator is appointed, he will decide either that there shall be no working such as is complained of, or that it shall exist with compensation.

(1) 1 J. & H. 108. (2) Law Rep. 4 Ch. 554.
(3) 2 Dr. & Sm. 347.

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In *Randegger* v. *Holmes* (1), where the question to be referred was one of law, and the objection was taken, the reference was nevertheless directed by the Judges of the Common Pleas. In *Seligmann* v. *Le Boutillier* (2) the same thing was done.

Upon the authority of these cases, and upon the construction of the Act, the Defendants are entitled to the order they ask.

July 18. SIR JOHN WICKENS, V.C.:—

Since yesterday I have had an opportunity of looking at the cases cited by Mr. *Dickinson* in reply, and also of looking, though rather hastily, at a good many other cases; and I think, although the motion is an important one, I may as well dispose of it now.

The question in the suit is whether the lessees, under a lease dated the 25th of April, 1866, of minerals at *Lamerton*, in *Devonshire*, are entitled to carry through a shaft, the upper part of which is in the lessor's land, the produce of other mines belonging to Lord *Fortescue*, and leased to the same lessees, and into which the shaft runs at its lower extremity. There is a subsidiary question, which I need hardly advert to, as to whether it is open to the lessees under the lease to open or keep open any communication between the lessor's mines and Lord *Fortescue's*. The shaft, as I understand the facts, is made in a direction not vertical, but inclining from the vertical. It would, as I gather, have been made in the same direction if the lands had been held under the same lessors, the inclination being the consequence of its following the lode. Partly, therefore, it was made under the powers of the lease, and partly it was made under some other rights of the lessees, with which I have at present nothing to do. The lease contains a clause which (omitting the immaterial parts) is as follows:—"Provided always, and it is hereby agreed and declared, that if and whenever any dispute, question, or difference shall arise between the said parties to these presents, or their respective executors, administrators, or assigns, touching any dues or money payable or retainable under these presents, or the price to be paid for any engines, machinery, or apparatus taken by the lessors,

(1) Law Rep. 1 C. P. 679. (2) Law Rep. 1 C. P. 681.

their heirs, or assigns, in pursuance of the provisions in that behalf hereinafter contained, or touching these presents, or any clause or matter or thing herein contained, or the construction thereof, or the working of the said mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessees herein contained, or touching the rights, duties, and liabilities of either party in connection with the premises, the matter in difference shall be referred to two arbitrators or their umpire."

The bill was filed in July, 1870, and the cause now comes on to be heard upon a motion on behalf of the Defendants for an order to refer the question in the suit to arbitration, and to stay all proceedings, under the 11th clause of the *Common Law Procedure Act*, 1854. No answer has been put in, and the nature of the defence is not absolutely clear. But I gather that it is rested partly on the construction of the lease, having regard to the circumstances under which the parties executed, and partly on what passed in the negotiations which then took place. Rectification was mentioned in the argument; but rectification in the technical sense seems to me, I confess, out of the question. If *A.* induces *B.* to execute a lease in the belief that the lease will have an effect different from what it really has, *B.* may have a remedy in this Court; but not a remedy by way of rectification, as I understand the meaning of that term.

The motion, as I have said, is made by the Defendants, and seeks to stay proceedings under the Act. So far as I can discover, no order to the effect asked for has ever been made by the Court of Chancery; at least there is no reported case in which such an order has been made, though such an order has been sometimes asked for and refused. In *Wheatley* v. *Westminster Brymbo Coal and Coke Company* (1) the Vice-Chancellor *Kindersley* seems to have refused the order very unwillingly, and on special grounds which in no degree apply to this case. Such orders have been very frequently made by Courts of Law. The construction which these Courts have put on the clause seems to have been that whenever the agreement to refer covers the question which the action raises, the matter should be referred, even although it is properly one

(1) 2 Dr. & Sm. 347.

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of law, and even though the Defendant's case may be properly raiseable in a cross action; in fact, in all cases except where there is a question of actual fraud. In cases of actual fraud the Court refuses to interfere on two grounds: first, because when personal fraud is in issue the case is properly one of publicity, and for a jury; and secondly, because the parties to a contract can hardly be supposed to have endeavoured to refer to a conventional tribunal any attempt by one of them to cheat the other. But in all other cases the Courts of Law seem to consider that the Defendant is entitled to the reference when he once has shewn that the point is one which the Plaintiff agreed to refer.

Here the question raised appears to me to be within the reasonable and fair construction of the clause of reference; and there is no case of actual fraud on either side. The only question is whether there are other special grounds for refusing the stay of proceedings to which the Defendant is *primâ facie* entitled.

Following the decisions, I must consider it as wholly immaterial that the Court of Chancery might be a cheaper, quicker, or more competent tribunal than the conventional one. The parties knew this, if it be so, when they entered into the contract. According to the decisions of the Courts of Law, in the correctness of which I fully concur, the Act, in all but the excepted cases, has taken the general question of the expediency or fitness of the tribunal out of the purview of the Court to which application is made. This seems the true answer to what was much insisted on by the Plaintiffs, and which struck me at the time as an argument deserving much attention, namely, that the arbitrators could grant no injunction, and that therefore I could not make the order without deciding against the Plaintiff's title in that respect. If the parties agreed to refer the consequences of their contract to a Court which could grant no injunction, they did so knowingly, and must be bound by it.

8 Ch. D. 34

The case is, no doubt, different where the suit that it is desired to stay seeks for a receiver, which is an intervention of this Court for the purpose, not of determining anything between the parties, but of keeping things intact while the dispute is being determined, or such special intervention as a *ne exeat*, or an injunction answering the same purpose as a receiver does; that is, of keeping matters

in statu quo. The injunction here sought is not for the purpose of keeping the matter intact till the dispute is determined, but a mode of giving to the Plaintiff the benefit of a determination if made in his favour. Probably, on an analogous ground, the Court might refuse to stay a suit which sought rectification, since the power of rectifying is one which cannot be relegated. But it is not to be overlooked that the case for rectification, if there be one here, is the case of the Defendants, who apply for the stay, and not that of the Plaintiffs, who resist it.

Some doubts, which I fear I suggested myself, were raised as to the application of the Act to the particular contract to refer which is here to be dealt with. I do not consider the contract very happily worded; but the difficulties are not, as I am convinced, such as to prevent the Act from applying in a case like this, where the parties have expressly contracted that it shall apply. It is possible that the Defendants, if I make the order, may find serious difficulties in working it out; but I think them entitled to try whether they can do so, and I therefore make the order according to the notice of motion.

A discussion then ensued upon a fact not adverted to in the argument, viz., that a Mr. *Williams*, one of the lessees, was not a party to the motion; and the order which it was the intention of the Court to make was not, therefore, then pronounced.

Subsequently Mr. *Williams* expressed his willingness to be bound by the judgment, and the order was directed to be drawn up accordingly.

Solicitors for the Plaintiffs: Messrs. *Fox & Robinson.*
Solicitors for the Defendants: Messrs. *Child & Batten.*

V.-C. W.

1872

June 12, 22; *July* 6.

MACFARLAN *v.* ROLT.

[1871 M. 224.]

Production of Documents—Claim of Privilege—Sufficiency of Affidavit.

Documents passing between the Defendants or their agents and their solicitor *ante litem motam*, and stated in the affidavit as to documents to be "confidential communications between solicitor and client with reference to matters which are now in question in this cause," are described sufficiently to protect them from production.

Manser v. *Dix* (1) followed.

Ante 480-2
18 & 652.
17 ChD 676, 9
681, 3

ADJOURNED SUMMONS.

The bill in this suit was filed in November, 1871.

The general object of the suit was to obtain a declaration that a convention, which the Defendants *Rolt, Hills, Churchill,* and *Churchward* alleged to have been granted to them for the purpose of establishing a line of steam vessels between *Antwerp* and *New York,* was subject to the equities attaching to a certain definitive convention of the 27th of July, 1871, so far as regarded the claims of the Plaintiff and the Defendant *Glassford* therein; that the Plaintiff and the Defendant *Glassford* were entitled in equity to a charge upon the convention granted to the Defendants *Rolt, Hills, Churchill,* and *Churchward,* commensurate with their interest in the definitive convention of the 27th of July, 1871; and that to that extent the Defendants *Rolt, Hills, Churchill,* and *Churchward,* and the Defendants the *Thames Shipbuilding, Graving Docks, and Ironworks Company, Limited,* might be declared trustees of the said convention for the Plaintiff and *Glassford;* an injunction; the necessary accounts, inquiries, and directions; and the costs of the suit.

By an order made in the cause on the 8th of December, 1871, the Defendants (other than *Glassford*) were ordered to make the usual affidavit as to documents.

On the 29th of January, 1872, the Defendants *Rolt, Hills, Churchill,* and *Churchward* filed an affidavit by which they admitted the possession of the documents relating to the matters in

(1) 1 K. & J. 451–460. 1 Jur NS 466

question in the suit set forth in the first and second parts of the schedule to that affidavit; but they "objected to produce the documents specified and set forth in the second part of the schedule thereto, as they said and insisted the same were privileged documents, and that the grounds of privilege fully appeared in the description of such documents respectively."

The schedule to that affidavit was in two parts, and together contained 164 specified documents. Those in the second schedule were letters and telegrams written and sent between the Defendant company and their solicitors and agents during the period commencing the 6th of July, 1871, and ending the 2nd of October, 1871. That affidavit was admitted to be insufficient.

Accordingly, on the 2nd of March, 1872, the same four Defendants filed a further affidavit by which they deposed as follows:—

"1. Since the filing of our former affidavit in this cause on the 29th of January, 1872, our solicitors, Messrs. *Evans & Co.*, have discovered that they had, at the date of the filing of the said affidavit, in their possession, and for the purposes of this suit we therefore say that we then had in our possession, custody, or power, the additional documents relating to the matters in question in this suit set forth in the first and second parts of the schedule hereto annexed.

"2. We object to produce the documents specified and set forth in the second part of the schedule hereto, as we say and insist that the same is a privileged document, it being a communication between the solicitors acting for us in the matters in question in this suit and the agent of such solicitors, such agent being also in the capacity of our solicitor or *avoué* in *Brussels* with reference to the said matters in question.

"3. Save as aforesaid, and speaking to the best of our knowledge, information, and belief, we had not at the date of filing our said former affidavit, and never had had in our or either of our custody or power, or in the possession, custody, or power of our solicitors, agent or agents, or in the possession of any other persons or person on our behalf, any deed, accounts, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document whatsoever relating to

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the matters in question in the suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the schedule to our said affidavit filed on the said 29th of January, 1872, and the said schedule hereto.

"4. Referring to the privilege claimed by us in respect of the documents mentioned and described in the second part of the schedule to our former affidavit filed in the cause on the 29th of January, 1872, we say that all such documents, except those in the said schedule numbered 147, 148, 149, and 150, and the documents therein described as the bills and papers, &c., in this suit, 'were communications passing between us or Mr. *Frederick John Divers*, acting on our behalf, and our solicitors with reference to matters which are now in question in this cause; and that the same are all confidential communications as between solicitor and client.' Referring to the documents mentioned and described in the said second part of the said schedule, and which are therein numbered 147, 148, 149, and 150, we say that the same are confidential communications between our said solicitors and M. *F. Mahieu*, as *avoué* (solicitor), of *Brussels;* and that such communications were made to or by the said M. *Mahieu* as the agent of our said solicitors with reference to matters which are now in question in the cause."

The schedule to that affidavit was in two parts, and, together, contained seventeen specified documents.

The case came on to be heard upon a summons taken out by the Plaintiff to consider the sufficiency of the affidavits of the Defendants *Rolt, Hills, Churchill*, and *Churchward* in respect of the objection to produce the several documents by the affidavits objected to be produced; that such of the documents as should not be held to be privileged should be produced, in the terms of the order of the 8th of December, 1871; and that the Defendants *Rolt, Hills, Churchill*, and *Churchward* should make a further affidavit in the usual form as to other documents not set out in the affidavits, but mentioned in the summons.

The Defendants had, since filing their second affidavit, put in an answer to the bill, setting out the document mentioned in paragraph 2 of that affidavit. As to that, therefore, there was no

question. But the documents mentioned in paragraph 4 were still claimed to be privileged, first, as passing between the Defendants and Mr. *Divers* on their behalf and their solicitor; and, secondly, as communications passing between M. *Mahieu*, the *avoué* at *Brussels*, alleged to be the agent of the Defendants' solicitor and such solicitors.

Among the documents sought to be privileged was a telegram, dated the 3rd of July, 1871, sent by the Defendants to a Mr. *Heritage*, and numbered 141. At that time Mr. *Heritage* was the only solicitor acting in the matters in question between all the parties, although the Defendants, by their answer, said they did not know what he was doing, and that he had in many instances acted without their instructions. The question, therefore, was whether the documents sought to be protected—viz., the letters and telegrams—were written and sent at such times and under such circumstances as to make them privileged.

Mr. *Greene*, Q.C., and Mr. *Crossley*, for the Plaintiffs:—

The documents now sought to be privileged are not properly so, because, first, they are documents passing between the solicitors of the Defendants and Mr. *Divers*, who is a third party—not a party to the suit—and the secretary of the Defendants the *Thames Iron Works Company: Ford* v. *Tennant* (1); secondly, they were not made, and did not take place, in anticipation of the litigation which has subsequently arisen. They range in date from the 3rd of July to the 2nd of October, 1871, during which time no dispute had arisen between the Plaintiff and the Defendants; the solicitor for the Defendants was then the only solicitor acting in the matter, and virtually, therefore, acting as much for the Plaintiff as the Defendants: *Flight* v. *Robinson* (2); *Paddon* v. *Winch* (3); *Reynell* v. *Sprye* (4); *Beadon* v. *King* (5); *Radcliffe* v. *Fursman* (6); *Gresley* v. *Mousley* (7); *Lord Walsingham* v. *Goodricke* (8); *Glyn* v. *Caulfield* (9); (*Simpson* v. *Brown* (10) (is a very different case

(1) 32 Beav. 162.
(2) 8 Ibid. 22.
(3) Law Rep. 9 Eq. 666.
(4) 10 Beav. 51.
(5) 17 Sim. 34.
(6) 2 Bro. P. C. 514.
(7) 2 K. & J. 288.
(8) 3 Hare, 122.
(9) 3 Mac. & G. 463.
(10) 33 Beav. 482.

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from the present one); *Storey* v. *Lord Lennox* (1); *Clinch* v. *Financial Corporation* (2); *Bovill* v. *Cowan* (3); *Hughes* v. *Biddulph* (4); *Bolton* v. *Corporation of Liverpool* (5); *Herring* v. *Cleobury* (6) (this is the strongest case against us, but is well explained by Lord *Westbury* in his argument in *Goodall* v. *Little* (7)); *Pearse* v. *Pearse* (8); *Manser* v. *Dix* (9); *Hawkins* v. *Gathercole* (10); *Garland* v. *Scott* (11); *Russell* v. *Jackson* (12); *Thompson* v. *Falk* (13); *Charlton* v. *Coombes* (14); *Nicholl* v. *Jones* (15); *Ross* v. *Gibbs* (16); *Lafone* v. *Falkland Islands Company* (17); *Culley* v. *Richards* (18); *Burrell* v. *Nicholson* (19); *Combe* v. *Corporation of London* (20).

As to the second part of the summons, viz., the affidavit as to other documents, we say, where there is a reasonable suspicion that further documents exist, they must be produced. Here there is such "suspicion," so great that we are enabled to specify the documents we want. Therefore they should be produced: *Noel* v. *Noel* (21); *Westminster and Brymbo Colliery Company* v. *Clayton* (22).

Mr. *Karslake*, Q.C., and Mr. *Waller*, for the Defendants, did not object to make the further affidavit asked for as to three letters and some other documents in their possession.

Mr. *Greene*, in reply.

SIR JOHN WICKENS, V.C.:—

As to the general question here I shall follow *Manser* v. *Dix* (23), which appears to me to be applicable to this case. My personal opinion is, that the principle of that case might be extended. I

(1) 1 My. & Cr. 525.
(2) Law Rep. 2 Eq. 271.
(3) Ibid. 5 Ch. 495.
(4) 4 Russ. 190.
(5) 3 Sim. 467; 1 My. & K. 88.
(6) 1 Ph. 91.
(7) 1 Sim. (N.S.) 155.
(8) 1 De G. & Sm. 12.
(9) 1 K. & J. 451.
(10) 1 Sim. (N.S.) 450.
(11) 3 Ibid. 396.
(12) 9 Hare, 387.
(13) 1 Drew. 21.
(14) 4 Giff. 372.
(15) 2 H. & M. 588.
(16) Law Rep. 8 Eq. 522.
(17) 4 K. & J. 34.
(18) 19 Beav. 401.
(19) 1 My. & K. 680.
(20) 15 L. J. (Ch.) 80.
(21) 11 W. R. 588; on app. ibid. 791.
(22) 12 W. R. 123.
(23) 1 K. & J. 451.

shall hold that the words of the affidavit cover the documents specifically described by them; if there are any others they should be produced.

MINUTES:—Adjudge the claim of privilege to be sufficient, and sufficient to cover all the documents mentioned in the second schedule, which bear out the description of being between solicitor and client; the telegram No. 141, and any other similar documents, must be produced; the Defendants must file a further affidavit, accounting for the three letters and other documents in their possession; and the costs of the summons must be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Kimber & Ellis.*
Solicitors for the Defendants: Messrs. *Evans & Co.*

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March 18; *April* 22.

Ex parte REED & STEEL.
In re TWEDDELL.

Bankruptcy—Assignment of Debtor's whole Property—Payment by Assignee of Bills accepted by Bankrupt—Substantial Advance—Act of Bankruptcy.

20 Eq 752.
18 W.R. 65.
46 L.J. Bk. 55.
15 Ch.D 44

Payment of bills by the drawer at the request of the acceptor, who, in consideration thereof, assigns to the drawer all his property to secure the amount and also certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy.

Therefore, where, at the request of *T., I., M., & Co.* paid the amount due on certain bills drawn by them and accepted by *T.*, and *T.* assigned to them his interest in certain marine engines and machinery (which constituted his whole property) as security for the moneys due on the bills, and also for other moneys due from him to them:—

Held, that the assignment was not an act of bankruptcy.

THIS was an appeal from an order of the County Court Judge, at *Sunderland*, dated the 2nd of February, 1872, refusing to set aside a security executed by the bankrupt to Messrs. *Iliff, Mounsey, & Co.*, which the trustees contended was an act of bankruptcy.

In October, 1869, the bankrupt contracted with Messrs. *Iliff & Co.* to build two iron sailing ships for £7000 each, the purchase-money for each vessel to be paid on its completion, half in cash, half in the bankrupt's acceptances at six months. The first of these two ships, the *Juno*, was completed in April, 1870, and the bankrupt paid £3500 in cash, and accepted four bills, dated April 23rd, 1870, drawn on him by Messrs. *Iliff* for the respective sums of £1000, £1000, £1000, and £500, payable six months after date, which therefore would fall due on the 26th of October, 1870.

Of these bills one for £1000 was paid away by Messrs. *Iliff & Co.* to the *Hartlepool Malleable Iron Company* on the 9th of August, 1870, and on the same day the bill for £500 was discounted by *Backhouse & Co.* for Messrs. *Iliff & Co.* On the 16th of August, 1870, the two other bills for £1000 were also discounted by *Backhouse & Co.*

The other ship, the *Jupiter*, was finished in June, and the bankrupt accepted four similar bills, dated June 20th, and in July paid the £3500 in cash, according to the agreement.

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In February, 1870, the bankrupt applied to Messrs. *Iliff & Co.* to build him a screw steamer, called the *Stephensons*, and on the 25th of March, 1870, the following memorandum of agreement was drawn up :—

"Memorandum of agreement made this 25th day of March, 1870, between *Iliff, Mounsey, & Co.*, iron-ship builders, and *Marshall Tweddell*, Esq., shipowner, both of *Sunderland*. That the former agree to build and the latter agrees to buy the vessel as described in specification marked 'A,' and dated this day, and which specification, and that of the engineers marked 'B,' is to be read and considered as part of this agreement. The price of the steamer, completed as per two specifications, to be £19,350, purchaser paying £5,400 for the engines, and also for the outfit, steam winches, &c., at prices estimated to be in order by the builders, they being responsible that the whole cost of the steamer does not exceed £19,350. Payment to be on completion of hull and outfit by half cash and half purchaser's acceptance at six months' date for the balance, after the engines and outfit are deducted. For the convenience of the builders, purchaser hereby agrees to accept their drafts for

£1000 on the keel being laid, at four months' date,
£1500 on the vessel being framed, at three months' date,
£1500 „ „ „ plated, at three „ „
£1500 „ „ „ launched, at two „ „

Which said drafts, if not paid before completion, are to be cashed by purchaser at the time of final settlement for the steamer. The said vessel to be launched and ready for engines in first week in August, 1870, unless prevented by fire, strike of workmen, or other inevitable accident.

"March 25th, 1870." "*Iliff, Mounsey, & Co.*"

Messrs. *Iliff & Co.*, in accordance with that agreement, drew the following bills upon the bankrupt, which he accepted :—

One for £1000, dated June 14, 1870, at four months, due October 14, 17, 1870.

One for £750, dated July 14, 1870, at three months, due October 14, 17, 1870.

One for £750, dated July 14, 1870, at three months, due October 14, 17, 1870.

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One for £1500, dated September 15, 1870, at three months, due December 15, 18, 1870.

One for £500, dated September 27, 1870, at two months, due November 27, 31, 1870.

Inasmuch as several of the bills drawn by Messrs. *Iliff & Co.*, and accepted by the bankrupt, were coming due in October, the bankrupt wrote the following letter to Messrs. *Iliff & Co.* :—

"*Sunderland*, Oct. 15th, 1870.

"Dear Sirs,—Will you please oblige me by withdrawing my acceptances to you due on 16th for £1000 and £1500 (2 £750) respectively, charging me with bank interest and any other charge accruing?

"Yours truly, *M. Tweddell.*"

"Messrs. *Iliff, Mounsey, & Co., South Docks.*"

Messrs. *Iliff & Co.*, in accordance with the request contained in that letter, held over the acceptances referred to therein which had not been negotiated, on the understanding that the bills shortly coming due in respect of the *Juno* would be paid by the bankrupt.

On the 24th of October the bankrupt wrote a letter to Messrs. *Iliff & Co.* stating that he had failed in his endeavours to sell the *Juno* and *Jupiter*, and asking them to renew the bills due in respect of the *Juno*, which became due on the 26th of October, which they refused to do without having some security; and accordingly, on the following day, the bankrupt wrote a letter to Messrs. *Iliff & Co.*, of which the following is a copy :—

"*Sunderland*, Oct. 25th, 1870.

"Dear Sirs,—I have no letter either from Captain *Wilson* from *London*, or from *Currie*, of *Liverpool*, at which I am greatly surprised.

"Respecting the bills which should be advised to-day, the only way, if you are so anxious, is to give you the security of engines, boilers, and outfit, which will now be daily going on board the steamer, to double the amount of the bills.

"I don't think there is anything unusual in renewing bills when we cannot sell, nor that it should in any way affect your relations at the bank, and in an ordinary way they will be mostly all off in two months from this time, including this renewal, which I am

exceedingly sorry to ask; but I cannot help myself or compel people to buy. "Yours very truly,

"Messrs. *Iliff, Mounsey, & Co.*" "*M. Tweddell.*"

The bankrupt had contracted with *Tennant & Co.*, of *Leith*, to supply the engines, boilers, &c., for the steam-ship, which was named *Stephensons*, for £5400, and *Tennant & Co.* had contracted with *R. H. Tweddell & Co.*, of *Monkwearmouth*, for the purchase of two marine boilers for the ship for £1300, and as the boilers were not ready for delivery on board the *Stephensons* by the 26th of October, *R. H. Tweddell & Co.* wrote the following letter to Messrs. *Iliff & Co.*:—

"*Richmond Street* and *Wreath Quay, Sunderland,*

"Messrs. *Iliff, Mounsey, & Co.* "Oct. 26th, 1870.

"Gentlemen,—At the request of Mr. *Marshall Tweddell*, and for your security, we beg to state that we will hold the boilers now building by us for your No. 45 S.S. (*i. e.* the *Stephensons*) on your behalf. They, with donkey boilers, winches, masts, &c., will all be delivered next week. As soon as you have steamer under crane, we are ready with W. B. pumps, winches, and boilers.

"Your obedient servants,

"*South Docks.*" "*R. H. Tweddell & Co.*"

On the same day, the 26th of October, the bankrupt gave the security to Messrs. *Iliff & Co.*, which this motion sought to have set aside. The security was as follows:—

"*Sunniside, Sunderland,* October 26th, 1870.

"Messrs. *Iliff, Mounsey, & Co., South Docks.*

"Dear Sirs,—In consideration of your agreeing at my request to retire my four acceptances of your drafts, all due in *London* this day, and amounting together to £3500, I agree that you shall have a lien upon the new steamer, No. 45, lying in the *South Docks* here, and now being finished by you for me, under agreement dated the 25th of March last, and on the engines, boilers, donkey boilers, pumps, winches, masts, and outfit, which I have ordered or shall hereafter order for her, and whether actually delivered on board of her or not, as well for the purchase-money of such steamer as also for the amount of said acceptances, and also of four other my acceptances of your drafts, all due on the 17th of

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December next, and together amounting to the further sum of £3500, with interest on all the before-mentioned bills at £6 (six pounds) per centum per annum, the cost of noting and banker's charges and commission, law charges, and all usual expenses, and any other liability due from me to you.

"And I undertake to put on board the whole of the engines, boilers, donkey boilers, pumps, winches, masts, and outfit with the utmost possible dispatch.

"And I further agree, for the consideration before-mentioned, that the whole of the purchase-money of the before-mentioned steamer shall be payable to you in cash upon completion, instead of half in cash and half by my acceptance at six months date, as provided by the said agreement, but subject to a rebate of £5 (five pounds) per centum per annum on one-half of the agreed purchase-money; and that if I do not sell the steamer within three months from this date, you shall be at liberty to do so for the best price and upon the best terms you can get either for cash or bills, and to credit me with the proceeds against my current liabilities with you. And for further effectuating a lien which I so give, I now hand you Messrs. *R. H. Tweddell & Co.'s* letter of this date undertaking to hold the boilers, donkey boilers, pumps, winches, masts, &c., on your behalf; and I authorize and empower you to procure delivery of the same, and of the engines and all the rest of the outfit, when and on such terms as you think proper in the event of my failing to put them on board, duly fitted as customary, within a reasonable time from this date.

"And I further agree that at my own expense I will execute all such further instruments for completing your security as you may require. "Yours truly,

"Witness, *R. W. Mills.*" "*M. Tweddell.*"

The bills, which fell due in respect of the *Juno* on the 26th of October, were, as regards one which had been paid to the *Hartlepool Malleable Iron Company*, in the hands of the *National Provincial Bank*, and as regards the three others, in the hands of Messrs. *Barclay, Beavan, & Co.* On receiving the security of the 26th of October, Messrs. *Iliff & Co.* gave orders to *Backhouse & Co.*, their bankers at *Sunderland*, to pay the four bills due in respect of the *Juno*, and *Backhouse & Co.* accordingly sent instruc-

tions to that effect to Messrs. *Barclay, Beavan, & Co.*, and the amount due on the bills was paid on the 27th of October, and debited by *Backhouse & Co.* to Messrs. *Iliff & Co.*, who paid to *Backhouse & Co.* the amount, with all expenses thereon.

On the 1st of November, 1870, the bankrupt sold the *Stephensons* to Messrs. *Heald & Co.* for £24,000, of which sum the bankrupt received £3,600 as a deposit, and the rest was, on the 16th of December, paid by Messrs. *Heald & Co.*, with the consent of the bankrupt, to Messrs. *Iliff & Co.* in discharge of his liabilities to that firm. *Tweddell* was adjudicated bankrupt on the 25th of January, 1871, and on the 20th of February Messrs. *Reed & Steel* were appointed trustees. No objection was raised by the bankrupt or by the trustees to the charge of Messrs. *Iliff & Co.* with respect to the *Juno* and *Jupiter* and the *Stephensons* until June, 1871.

On the 2nd of February, 1872, the County Court Judge at *Sunderland* dismissed, with costs, an application by the trustees, by which it was sought to have the agreement of the 26th of October, 1871, declared invalid, and to have the accounts with respect to the two ships, the *Juno* and *Jupiter*, reopened; but with respect to the *Stephensons*, the County Court Judge directed that an account should be taken as to certain overcharges and omissions.

Against this order the trustees appealed.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the trustees:—

The agreement of the 26th of October, 1870, is an act of bankruptcy, as the bankrupt parted with practically the whole of his property to secure a pre-existing debt: *Ex parte Foxley* (1); *Smith* v. *Cannan* (2). If the agreement was not valid, the delivery of the engines on board was an act of bankruptcy: *Lacon* v. *Liffen* (3); *Hutton* v. *Cruttwell* (4). No equivalent was received by the bankrupt for making the agreement, in which respect this case differs from *Mercer* v. *Peterson* (5). The assignment is fraudulent within the meaning of the *Bankruptcy Act*, 1869, sect. 6, sub-sect. 2.

(1) Law Rep. 3 Ch. 515.
(2) 2 E. & B. 35.
(3) 4 Giff. 75.
(4) 1 E. & B. 15.
(5) Law Rep. 3 Ex. 104.

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Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for Messrs. *Iliff & Co.*:—

The assignment is valid, as a present advance was made by our clients to the bankrupt by paying the bills due in respect of the *Juno* at the date of the assignment, and the bankrupt actually received £3600 in cash as deposit-money, which was, or ought to have been, available for his creditors, and therefore he cannot be said to have assigned his whole property, and his creditors received a substantial advantage by the bankrupt being able to sell the ship: *Allen* v. *Bonnett* (1). The assignment was given in consideration of a prior agreement, and is therefore good: *Ex parte Blackburn* (2); *Re Cherry* (3).

Mr. *De Gex*, in reply:—

The cases of *Ex parte Blackburn* and *Ex parte Cherry* refer only to fraudulent preference, and we say that this assignment was an act of bankruptcy. Here the sole property of the bankrupt after the assignment was an equity of redemption, which is not a substantial exception: *Smith* v. *Cannan* (4); and the fact that the equity of redemption was of considerable value does not prevent the assignment being an act of bankruptcy. The payment of the bills by the drawer is merely a payment of his own debt, and a fulfilment of an antecedent obligation of his own, and cannot be called an equivalent to a substantial advance to the bankrupt.

April 22. SIR JAMES BACON, C.J.:—

The question has been reduced to very narrow dimensions. The single question argued is whether the transaction in question amounted to an act of bankruptcy or not. The agreement with the bankrupt which has been read gave a security upon the hull of the ship and the machinery which was to be in her. The ship was not completed, and there was a considerable amount of machinery to be put on board, and Mr. *De Gex's* claim is confined to that machinery. He is not seeking to impeach the agreement in other respects, but he says with reference to the machinery that the delivery was voluntary without equivalent, and was therefore

(1) Law Rep. 5 Ch. 577
(2) Ibid. 12 Eq. 258
(3) 19 W. R. 1005.
(4) 2 E. & B. 35.

15 Ch D 44

an act of bankruptcy. I confess I do not follow that. The machinery was necessary to complete the ship. If a house is incomplete, and there are floors or cupboards or something else necessary to make it complete yet to be added, and there is an agreement to mortgage the house when the floors are put in, it cannot be said to be a mortgage of the house only. I do not think there is any distinction which can be drawn between chattels which are afterwards put in to complete the ship and the ship itself. It is not necessary to pursue that point. It was contended that it was an act of bankruptcy because the property of the debtor was parted with, for which his creditors received no equivalent. "Equivalent," no doubt, is an expression which may mislead, but I do not understand that in any of the cases it means a substantial sum of money paid down. If the trader carrying on his business has something done for him which enables him to continue carrying it on, that is an equivalent. It does not go directly to the creditors, but the creditors are greatly interested in the fact of the man carrying on his business, and if the transaction enables him to do so it cannot be said that the creditors had not some equivalent. The question as to the amount was never raised in any of the cases, but it is used only as a test of good faith in the transaction, and to exclude the notion that, by means of the agreement, whatever it was, the object was to prefer one creditor to the other.

Now, what is the transaction? It seems to have been as plain a transaction as could be conceived. The present creditors undertook to pay and advance on behalf of the bankrupt the amount of the several bills of exchange then outstanding, and on the very day on which the bills became due they did pay them. The evidence amounts to that most distinctly and clearly. There is a cavil raised by an affidavit which the bankrupt has been procured to make since this matter was last before the Court, in which he has been so good as to furnish the Court with his notion of what retiring a bill of exchange means. It means, as I understand it, so to deal with it as that the man who is personally liable shall not be sued upon it, which he might be unless it is retired before the time at which it could be noted. By the evidence I find it clearly proved that on the day after the bills became due all liability of the bankrupt to pay them was taken off his shoulders. If the

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bills had been left where they were the holders of them might have sued the bankrupt immediately for the amounts due upon them, and then his credit would have been damaged; but for the notion, that because the bills were presented in the course of one day in *London*, and when the next day had arrived they must be held unpaid, and that thereby the credit of the bankrupt was injured, there seems to be no kind of foundation. No man's credit can be injured by that, because various circumstances, such as delay in the post and a variety of other accidents, might account for a bill not being paid till the day after it became due. If anybody said that his credit was damaged because the bill was not paid on the day, and he holds the bill in his hands, that would be an answer to it.

In my opinion, under the circumstances, having regard to the facts of this case and the numerous cases decided on the subject (*Allen* v. *Bonnett* (1) being one of the last though not the least important), there is no ground for saying that the transaction between the bankrupt and his then creditors was an act of bankruptcy. If it is not an act of bankruptcy, then there is no ground for the appeal. In my opinion the contention entirely fails. It is a *bonâ fide* transaction coming within the principles established by the cases, and I think the judgment of the County Court Judge was right. The appeal will therefore be dismissed, and must of necessity be dismissed with costs.

Solicitors: Mr. *Hicklin*, for Mr. *Brown, Sunderland;* Messrs. *Redpath & Holdsworth*, for Mr. *Ralph Simey, Sunderland.*

(1) Law Rep. 5 Ch. 577.

SOUTHAMPTON DOCK COMPANY *v.* SOUTHAMPTON HARBOUR AND PIER BOARD.

V.-C. B.
1872
July 3, 4, 5.

[1870 S. 280.]

Statutory Corporations—Compensation for Loss of Income—Right to have Income made up to a certain Sum—Annual Demand—Laches—Account—Wilful Default.

Upon the establishment in 1836 of a dock company, it was enacted that, in order to indemnify the commissioners of a neighbouring harbour for loss of income, the company should pay to the commissioners such annual sum as should make up the income of the latter to the average of the three next preceding years. Afterwards, in 1843, the above enactment was repealed, and in lieu of making up an average, it was enacted that the company should pay to the commissioners every year the deficiency by which the yearly income of the latter should fall short of £1000.

In 1860, up to which time no demand had been made by the commissioners against the company, a mandamus was issued at the suit of a third party against the commissioners commanding them to take the necessary steps for recovering from the company payment of certain alleged deficiencies in their income, extending over twelve years, from 1847 to 1858 inclusive; and (the mandamus having in 1870 been finally declared to be valid) in June, 1870, a demand in respect of the alleged deficiencies from 1847 to 1858 was first made upon the dock company by the harbour board (who had succeeded to the commissioners). This was followed by an action for the amount. Upon bill by the company in November, 1870, to restrain the action, and for declarations that in estimating the amount of the deficiencies the board were liable to give credit for all sums which their predecessors might but for their wilful default have received; and that the board were debarred from requiring payment of any deficiencies prior to 1870:—

Held, that it was part of the duty of the commissioners year by year to have demanded from the company payment of any sum that might have been due to them from the company under the statutes; and that by the laches of their predecessors the board were now debarred from calling upon the company to pay for any deficiencies prior to 1858:

Held, further, that the board were not debarred from calling upon the company to pay deficiencies since 1858; and hence that the company were entitled to an account from the board of their income since that date, charging wilful default.

The harbour commissioners, in the exercise of their discretion, had permitted certain small articles on which they were empowered by statute to levy duties, to pass free of duty. They had also leased their tolls, having no statutory power to do so:—

Held, as between the dock company and the harbour board, that these were acts of wilful default.

MOTION FOR DECREE.

The Defendants, the *Southampton Harbour and Pier Board*,

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were constituted, in 1863, out of a former body, called the *Commissioners of the Port of Southampton*, to whom certain duties, then payable to the Corporation of *Southampton*, were by an Act of the 43 Geo. 3, c. xxi., passed in 1803, made payable (1). This statute was followed by a second Port Act, passed in 1810, the 50 Geo. 3, c. clxviii. (2).

The Plaintiffs, the *Southampton Dock Company*, were incorporated in 1836 by an Act of 6 Will. 4, c. xxix., called the first Dock Act, which, by sect. 124, made provision for any diminution which the income of the commissioners of the port might undergo, in consequence of the establishment of the docks (3); and by

(1) Sect. 17 of the 43 Geo. 3, c. xxi., provided that when the harbour works should have been completed, the expense paid, and every debt and incumbrance satisfied, it should be lawful for the commissioners "to reduce or lessen" the rate of duties to such payments as should be equal to pay and make good "the annual payment to be made to the" corporation; such annual payment not being less than one-fifth part of the amount of the rates of the preceding year; or, if it should be found necessary to "advance the said rates and duties again, or to lower the same," it should be lawful for the commissioners "to make such alterations in the said rates or duties" as should from time to time be necessary.

Sect. 18 provided that the commissioners should have "full power and authority . . . to make such orders and rules, and give such directions for the collecting, receiving, and disposing of the said sums of money and duties" as they should think "most necessary and conducive to the end for which the same" were given; and all the sums of money before mentioned should be "paid to, and collected and received by, such person or persons" as should be chosen by the commissioners at a meeting to be held for the election of officers. . . .

Sect. 19 provided that all money raised and received, other than so much as should be allowed "for collecting and managing the said duties, or for charges of recovering the same," should be applied as follows:—in the first place, to the payment of one-fifth of the same to the corporation, yearly and every year, as a compensation for the loss which would accrue to them by the abolishing the said duties, . . . and that books of receipt should be "provided and kept" by the receiver or collector.

(2) By sect. 20 of this Act (which repealed the existing rates and some of the provisions of the former Act) the commissioners were authorized and empowered "to lessen and reduce, and again to raise and advance" the rates and duties granted by that Act.

(3) Sect. 124 (so far as is material) was as follows:—

"For providing against any loss or diminution of income which might be sustained by the commissioners acting in execution of the said" (1st and 2nd Port Acts) "be it further enacted that the said company shall, and they are hereby required to pay to the said commissioners for the time being (from and after the opening of the said dock or docks for the reception of ships and goods as aforesaid), out of the rates, rents, and sums hereby authorized to

sect. 125, provided also that for the purpose of estimating such loss of income, if any, the commissioners of the port should produce their books of account to the directors of the dock company (1).

In 1843 was passed a second Dock Act, the 6 & 7 Vict. c. lxv., whereby the 124th and 125th sections of the 6 Will. 4, c. xxix.,

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be taken and received, such annual sum as shall be sufficient to make up the annual income of the said commissioners, to be derived, under or by virtue of the said" (2nd Port Act), "from the rates, duties, and payments thereby authorized to be taken and received in respect of goods, wares, merchandize, and other commodities, to such annual amount as shall be equal to the average annual income derived by the said commissioners from the last-mentioned rates, duties, and sums, during the three years next preceding the passing of this Act, and that such annual sum shall be computed up to the 25th day of March in each year, and be payable on the 1st day of May in each year; and that in case the said dock or docks should be opened as aforesaid on any other day than the 25th day of March, then a proportionable sum shall be paid; and that such annual payments and proportionable part shall be paid and payable in preference to the interest of the money which shall be raised by any mortgage, assignment, or charge, as herein provided, and in preference to any dividends payable by virtue of this Act, to the proprietors of the said company, or any of them: Provided always, that in case the said commissioners shall at any time reduce, alter, or vary the said last-mentioned rates, duties, and sums below the rates, duties, and sums now received and taken by them on such goods, wares, and merchandize, the said company shall not be liable to pay to the said commissioners, in respect of such loss or diminution of income as aforesaid, any greater sum than the difference between the annual income which would have been received by the said commissioners in case such rates, duties, and sums last-mentioned had not been so reduced, altered, or varied, and the average annual income derived by the said commissioners from the same rates, duties, and sums, during the said three years next preceding the passing of this Act."

(1) Sect. 125 was worded as follows:—

"For the purpose of ascertaining the amount of the loss or diminution of income which may be so sustained by the commissioners, . . . and of ascertaining the amount of their average income derived from the rates, duties, and payments on goods, wares, and merchandize, as aforesaid, during such three years as aforesaid, the said commissioners shall, and they are hereby required, at all reasonable times, on request, to produce and shew forth to the directors of the said company, or such person or persons as they shall appoint for that purpose, all books, accounts, and papers in the custody, possession, or power of the said commissioners, or of their officers, clerks, and servants, or any of them, which shall in anywise concern or relate to the rates, duties, and payments which, under or by virtue of the said" (1st and 2nd Port Acts), "or either of them, might or may be taken, collected, or received in respect of goods, wares, merchandize, and other commodities. . . ."

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were repealed, and in lieu thereof it was provided (sect. 53) that the port commissioners should in every year make up to the dock company the deficiency, if any, by which their income for that year should fall short of £1000 (1).

It was asserted and not denied that during the year ending on the 31st of March, 1847, and the eleven succeeding years, the income of the port commissioners fell below £1000 a year, but no demand was made upon the dock company before the 13th of January, 1860, when a mandamus issued, at the suit of the Corporation of *Southampton*, commanding the commissioners to take

(1) Sect. 53 was in the following terms:—

"For providing against any loss or diminution of income which may be sustained by the commissioners acting in the execution of the said" (1st and 2nd Port Acts), "be it enacted, that in case the annual income of the said commissioners arising from the rates, duties, and payments by them taken and derived in respect of goods, wares, merchandize, and other commodities, shall, in any one year after the opening of the said dock or docks for the reception of ships and goods, fall below the sum of £1000, then and in such case, and so from time to time as often as the same shall happen, the said company shall, and they are hereby required to pay to the said commissioners for the time being, out of the rates, rents, and sums in such recited Acts, and each or either of them, and of this Act, authorized to be taken and received by the said dock company or their successors, such annual sum as shall be sufficient to make up any such deficiency as aforesaid, and that such annual sum shall be computed to the 31st day of March in each year, and shall be paid and payable to the said commissioners on the 24th day of June in each year; and in case the said dock or docks shall be opened as aforesaid on any other day than the 31st day of March, then a proportionate sum . . . and that such annual payments and proportionable part shall be paid and payable in preference to the interests, dividends, and income of the moneys or stock which shall be raised or created under any of the powers or provisions of the said recited Acts, or either of them, or of this Act, and in preference to any dividends or income payable by virtue of the said recited Acts, or either of them, or of this Act, to the proprietors of the said undertaking, or any of them; and that such annual payments and proportionable payment shall be paid and payable as aforesaid, notwithstanding the said commissioners shall at any time or times reduce, alter, or vary the said last-mentioned rates, duties, and sums below the rates, duties, and sums now received and taken by them on such goods, wares, and merchandize, and notwithstanding the said commissioners shall at any time or times compound and agree by the year, or for any shorter time, with any person or persons, for or in respect of such last-mentioned rates, duties, and sums, and shall accept and take such rent or rents, or sum or sums of money by the year, or for any shorter time, in lieu of such last-mentioned rates, dues, and sums on such goods, wares, and merchandize."

the necessary steps for recovering payment from the dock company of a sum of £3710 7*s.*, being the aggregate of the alleged yearly deficiencies during the twelve years above mentioned. After a long litigation, it was ultimately, in April 1870, decided by the House of Lords that a writ of mandamus would lie, and that the writ in this instance was valid and sufficient: *Reg.* v. *Commissioners of Port of Southampton* (1).

On the 28th of June, 1870, the solicitor of the Pier and Harbour Board (which had, as above stated, succeeded to the Port Commissioners) wrote to the secretary of the company a letter in the following terms:—

"I am instructed by the *Southampton Harbour and Pier Board* to apply to the *Southampton Dock Company* for payment of the sum of £3710 7*s.*, being the aggregate amount required for the year ending on the 31st day of March, 1847, and for the eleven succeeding years, to make up the income of the Commissioners of the Port and Harbour of *Southampton*, arising from the rates, duties, and payments derived and taken by them in respect of goods, wares, merchandise, and other commodities, to the sum of £1000 per annum, and which deficiency your company, under the provisions of their Act of the 6th and 7th Vict. c. lxv., are liable to pay to my clients. I annex a statement shewing the sum due and payable in respect of each of the years I have mentioned. Your company is no doubt aware that my clients have received a peremptory mandamus issued out of the Court of Queen's Bench, commanding them to take the necessary and legal measures for obtaining payment of the sum before mentioned, and I have therefore to request that the subject shall receive the early attention of your company."

Then followed a statement of the deficiencies for the several years.

To this the solicitors of the company answered, on the 5th of August, 1870, as follows:—

"The directors of the dock company have given your application on behalf of the harbour commissioners, of the 28th June last, for £3710 7*s.*, careful consideration. They feel they are bound to satisfy themselves that the income of the commissioners, referred to in the 53rd section of 6 & 7 Vict. c. lxv., has fallen short of £1000

(1) Law Rep. 4 H. L. 449.

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per annum, and then to consider how far they would be justified in satisfying the claim. We shall therefore feel obliged if, at your earliest convenience, you will furnish us with detailed particulars of each year's receipts from the various sources of income authorized to be levied by the commissioners, and referred to in the statute on which the claim is founded. We apprehend the commissioners will, by production of their books, afford us every facility for verifying such accounts."

A statement of the commissioners' receipts for the twelve years was shortly afterwards furnished, shewing an aggregate of £8289 13*s.*, which fell short of £12,000 by £3710 7*s.*; and the solicitor to the board stated that if the company's solicitors wished to verify the accuracy of such statement by reference to the books of the commissioners, he should be happy to arrange for their production.

A correspondence ensued, in the course of which the solicitor to the board required, before producing the books and accounts of the commissioners, an admission from the company of the principle on which the demand of the board was based, and that the company should limit their inquiry to an examination of the accuracy of the figures which went to make up the total of £8289 13*s.*

The company's solicitors, on the other hand, without questioning the accuracy of the figures, and reserving all objections as to the principle on which the accounts might have been taken, required that the company should be satisfied that the commissioners had received and credited all the rates, duties, and payments authorized to be levied under these Acts.

Amongst other letters, one of the 8th of October, 1870, written by the company's solicitors to the solicitor of the board, contained the following passage:—

"In order that there may be no misconception as to the extent of the admissions and requisitions of the dock company, and that no further unnecessary costs may be incurred in this matter, we are instructed to give you distinct notice that the dock company fully and unreservedly admit every liability to which they are subjected by their Acts of Parliament; but that they require, before admitting the claim of the commissioners, to know on what terms or principle of accounting any such liability is now sought to be en-

forced." . . . "We have only to add that the dock company, unless they are supplied with the means of ascertaining, or, in accordance with your offer, are permitted by a simple inspection of the books of the commissioners, to ascertain whether there may have been any such loss or diminution of the income of the commissioners as would justify a recourse to the dock company, will hold the commissioners responsible for any costs which may hereafter be incurred in exacting the discovery now withheld."

The board having, in the name of their clerk, *Augustus Henry Skelton*, commenced an action against the company for £5000, this bill was filed by the company against the board and *Skelton* on the 15th of November, 1870, to restrain the action.

On the 9th of December, 1870, after argument, the injunction was granted. (See the report (1).

The harbour board, by their answer, filed in January, 1871, said they believed that by no communication had they or their predecessors ever represented that they intended to relinquish or waive their claims against the company; and that in August, 1861, the proceedings under the mandamus were reported by the company's directors to a general meeting of the company, and were matters of public notoriety, and hence that the company had notice of the rights of the board.

The bill was amended on the 17th of June, 1871, and, as amended, stated that the Act of 6 Will. 4, c. xxix., whereby the Plaintiffs were incorporated, contained a clause empowering them to set apart a reserve fund not exceeding £200,000, but the directors had not thought fit, in the exercise of their discretion, to create any such reserve fund, nor had the profits of the company's undertaking been at any time such as to justify their doing so.

It alleged that down to the filing of the original bill, inspection of the books of the board was refused; that since the institution of this suit Plaintiffs had discovered that the greater part of the books had been destroyed, but from such inspection as they had been able to obtain they believed the claim of £3710 7*s.* to be wholly inequitable.

Amongst the principal charges were the following:—

No demand was made by the Defendants prior to June, 1870,

(1) Law Rep. 11 Eq. 254.

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and the Plaintiffs "have for several years past declared dividends, and made payments to the shareholders in their undertaking, on the assumption that they were under no legal liability to the said harbour commissioners, or any other body, in respect of such alleged deficiency."

"It would be greatly prejudicial to the interests of their existing shareholders, and contrary to equity, that they should be required to pay out of their existing funds sums of money which ought to have been paid (if at all) in past years, and in respect of which nothing can now be recovered from the former shareholders. . . .

"The Plaintiffs . . . are placed at a great disadvantage by not having had an earlier opportunity afforded them of examining the accounts of the said harbour commissioners, and such disadvantage affords an additional reason why the Defendants' claim should be limited to some point of time considerably within the twenty years during which it might, but for the laches of the predecessors of the Defendants, the Harbour and Pier Board, otherwise be held to subsist."

The bill (as amended) prayed for a declaration that, "for the purpose of estimating the deficiency of income which, by the Act of the 6 & 7 Vict. c. lxv., s. 53, the Plaintiff company are bound to make good to the Defendants, the *Southampton Harbour and Pier Board*, the said board ought to give credit for all sums which their predecessors, the harbour commissioners, may have received, or, but for wilful default, might have received, in respect of duties leviable on goods, wares, merchandize, and commodities landed at or shipped from any of the legal quays in the town of *Southampton*, or for which a quay duty is chargeable in addition to pier duty."

Also for a declaration that the board "are debarred in equity from requiring the Plaintiff company to make good any deficiency of income as aforesaid which may have occurred previously to the year 1870, down to which time no demand was made upon the Plaintiff company in respect of such deficiency, and dividends were declared by the Plaintiff company, and paid to the shareholders in their undertaking, on the assumption that no liability to make good such deficiency in fact existed;" and that an account might be taken on the footing of the above declarations, and payment made of what should be found due.

In support of the charge of wilful default, they alleged that from the 1st of July, 1852, to March, 1858, the commissioners had leased portions of the harbour dues, and that for certain other portions of the dues no credit at all had been given; and these allegations were not denied.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Cookson*, for the Plaintiffs:—

On the question of laches on the part of the commissioners in not making demand during the twelve years, we cite *Drewry* v. *Barnes* (1); and on the failure of claims on the ground of want of materials on which to base the account, *Duke of Leeds* v. *Earl of Amherst* (2).

If this had been a legal demand, the right to sue for it would have been barred at the end of six years from the 31st of March, 1858. But it is an equitable demand, to which laches is a complete answer.

There is no power in the statute for the commissioners either to remit or to lease the tolls.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Eddis*, Q.C., and Mr. *E. Cutler*, for the Defendants:—

It is upon the Plaintiffs that the duty of paying is imposed by the statute; it is they who have omitted to fulfil their duty. They ought to have inquired and ascertained the extent of their obligations. By remaining silent they avoided the discharge of their liability. That disposes of the question of laches.

The Plaintiffs charge us with having made no demand, with having done nothing. That is not sufficient to raise an equity. What is required is, that non-demand shall have amounted to actual encouragement: *Jorden* v. *Money* (3). "In order to justify the application of the principle, it must clearly appear that the party against whom acquiescence is alleged should have full knowledge of his rights, and should by his conduct have encouraged the other party to alter his condition, and that the latter should have acted on the faith of the encouragement so held out":

(1) 3 Russ. 94. (2) 20 Beav. 239.
(3) 5 H. L. C. 185.

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Kerr on Injunctions (1), referring to Lord *Cottenham's* definition of acquiescence as distinguished from abandonment of rights, in *Duke of Leeds* v. *Earl of Amherst* (2); *Ramsden* v. *Dyson* (3).

This, moreover, is a statutory obligation, and an action of debt grounded on a statute is not within sect. 3 of the statute 21 Jac. 1, c. 16. *Darby* and *Bosanquet* on the *Statute of Limitations* (4), referring to *Jones* v. *Pope* (5); *Talory* v. *Jackson* (6); *Cork and Bandon Railway Company* v. *Goode* (7); *Shepherd* v. *Hills* (8).

The difficulty about furnishing accounts is altogether visionary.

The remission of tolls was very small, and the farming out of the tolls was within the commissioners' powers.

We submit to a decree for an account, and for payment of what shall be found due, leaving out all the declarations.

[They also cited *Rex* v. *Carpenter* (9).]

Mr. *Kay*, in reply.

[On the question of the *Statute of Limitations*, he cited *Pardo* v. *Bingham* (10). On that of acquiescence, *Dann* v. *Spurrier* (11), followed in *Rochdale Canal Company* v. *King* (12); *Archbold* v. *Scully* (13).]

SIR JAMES BACON, V.C.:—

The question between the Plaintiffs and the Defendants depends wholly upon the construction of the Acts of Parliament by which these parties are constituted. They are public bodies. They neither of them have any rights or duties, except those which are prescribed by the Acts under which they are incorporated.

The history of the case is simply this: The formation of the Plaintiffs, the dock company, was calculated to diminish the receipts of the harbour commissioners, and accordingly, as a term upon which the formation of the dock company was sanctioned by the Legislature, they were required to pay certain sums, or rather

(1) Page 202.
(2) 2 Ph. 117, 123.
(3) Law Rep. 1 H. L. 129, 141.
(4) Page 4.
(5) 1 Wms. Saund. 37; 1 Sid. 305.
(6) Cro. Car. 513.
(7) 13 C. B. 826.
(8) 11 Ex. 55, 67.
(9) 6 A. & E. 794.
(10) Law Rep. 4 Ch. 735, 738.
(11) 7 Ves. 231, 235.
(12) 2 Sim. (N.S.) 78, 88.
(13) 9 H. L. C. 360.

(3 SC 12 Jur N.S. 506

uncertain sums, to the harbour commissioners, for the purpose of indemnifying them for the loss which they might sustain by a part of their revenue being abstracted.

The Act of Parliament in which that was first provided was the 6th of Will. 4, c. xxix., in which were two clauses which, although the Act has been now repealed, it is necessary to refer to for the purpose of understanding the subject aright.

The 124th section provided expressly this:—[His Honour read the 124th section, extracted above, and continued:—]

The sums so payable being in their nature wholly uncertain, depending entirely upon the receipts of the commissioners, the same statute provided the means by which the exact amount so payable should be ascertained, and the 125th section enacted as follows:—[His Honour read the section.]

The meaning of that is perfectly obvious. The commissioners who received these rates could not carry on their business without keeping accurate accounts of them. The sum which should be payable by the company could not be ascertained but by an inspection of the books and accounts kept by the commissioners, and this Act of Parliament very reasonably provided that that machinery should be in existence, which would enable the commissioners to demand and require the company to pay whatever should become due in respect of the sums which were authorized to be paid.

Then the Act of the 6 & 7 Vict. c. lxv. alters that state of things. The average is lost sight of, and the direction there to the company is, that they shall pay such a sum of money as shall make up to £1000 a year any deficiency from that amount in the income arising to the commissioners from the dock dues. The two clauses I have before referred to are repealed, and sect. 53 provides:—[His Honour read the section, and continued:—]

And that is the obligation which at present exists.

Now it is impossible to read that last clause, which is the only one necessary for the present purpose to refer to, and not to see that this is the present state of things. The commissioners have the power of levying rates and dues; the company have the power to receive income in respect of their dock. If the income of the commissioners falls below £1000 a year, the company is to make

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it up to £1000 a year. The commissioners have power to reduce their dues if they like, to enter into contracts (as I read the Act) for the dues which were payable, and to take any rent in respect of the dues; and the payment which is to be made by the company is to be in preference to any dividends which they may make and distribute among their shareholders.

Now the duty of the company, as to all moneys received by them, is very clearly and distinctly prescribed by the Act. They are trustees merely. They receive the money in the first instance not for their own benefit. If they have borrowed money, they have to pay the interest on that money, they have to make any other payments which may become necessary for the carrying on of the enterprise in which they are engaged, and they are to make and distribute dividends of all that remains among their shareholders. But before any payment is made to the shareholders, the sum necessary to make up the deficiency of £1000 is to be set apart. There can be no doubt that when all the liabilities preceding the payment of dividends have been satisfied, the shareholders are the only persons entitled to receive what remains. Nor can it be doubted that each of these bodies, the commissioners no less than the company, knew what their respective rights and duties were, and I take it to have been as clearly the duty of the commissioners at the end of every year when the 31st of March arrived to make any claim or demand which they might have under these Acts of Parliament against the company, as it was to discharge any of the other duties which were imposed upon them by the statute. They could not, in my opinion, carry on their business with any propriety without doing it. The provision was inserted for their benefit. An obligation was laid upon the dock company, and was to be discharged by them; but when? Can it be said that they were to retain money in their hands to provide for some demand which might be made by the commissioners? How could they tell that any money would be payable by them, and if any, what amount would be payable? The former Act had provided that books should be kept in order to ascertain the amount. That provision was repealed by the Act of the 6 & 7 Vict. Therefore they remain in this position: The company receive money, the destination of which is prescribed by the statute.

There is a payment to be made out of the dock company's receipts, but not unless the commissioners require it; and when it is said that there is a clause in the Act of Parliament which enables the dock company to make a reserve fund, it is quite clear that that has no application to the present case, because it is purely optional whether they shall do so, and it would be contrary to the plain meaning of the statute to read it as meaning anything but this: "If, in the enterprise in which you are engaged, it becomes necessary that you should provide for some payment that will come upon you in some future year, for repair to the docks, or anything of that kind, you are authorized to set apart an amount sufficient to answer that purpose, and you are not obliged to ask the leave of your shareholders whether you shall do so or not." To hold that the meaning of that clause is that they should set apart a fund not exceeding £200,000 for the purpose of providing for any demand that may be brought against them, would be doing violence to the language, and would be plainly against the common sense and reason of the case.

This last Act was passed in the year 1843, since which time these different bodies, inhabitants of the same town, have been engaged in business of a similar nature, and no demand whatever is made by the commissioners against the dock company until the month of June, 1870. In the meantime the dock company have done the only thing which they could do. At the end of each year they have made up their accounts, have paid what was due in the shape of preference, and have distributed the rest amongst their shareholders. Then in the year 1870 there comes a demand by the harbour commissioners against the dock company for a sum amounting to £3710, for the aggregate of deficiencies in the receipts from the sum of £1000 through the successive years from the year ending March, 1847, down to the year 1858. The account is sent, and it is accompanied by a letter in these terms, written by the solicitor to the harbour board, and addressed to the company:—

[His Honour read the letter, as given above, and continued:—]

Now this may be added, or at least kept in mind, that for some time before any demand was made, the subject of the payment which the company was liable to make had been in litigation. It

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had been in the Court of Queen's Bench, and in the Court of Exchequer Chamber, and was ultimately carried to the House of Lords, and there it was established against the harbour commissioners that they ought to have taken, and ought then to take, proceedings to recover such sums of money as the dock company were liable to pay them. Until that took place, there is no trace of any demand being made by the harbour commissioners. They had been parties to the litigation to which I have referred; they had fought it at every stage, with varying success, and had ultimately failed on the pleadings or on the proceedings taken for the writ of mandamus.

Not only was no claim or demand made against the company until 1870, but in every step which the harbour commissioners have taken, they have disputed the liability of the company to pay any sum of money; because, in disputing their own obligation to call upon the company to pay anything, I think it may properly be said that they disputed the liability of the dock company to pay any sum of money with respect to that which forms the subject of this suit.

That letter is answered almost immediately afterwards, on the 5th of August, by the solicitors to the dock company, and they say:—[His Honour read the extract from the letter given above, and continued:—]

Then a statement is furnished and an offer is made to produce the books for inspection. To complete the history, I may mention that a series of letters pass between the parties, the most important of which is a letter of the company's solicitors, dated the 8th of October, 1870, in which they say:—[His Honour read the extract printed above:—]

The action having been brought, the present bill is filed. It alleges, among other things:—[His Honour read the charges so far as they are set out above:—]

The action was restrained by an injunction granted by this Court, and under these circumstances, and upon these allegations, the Plaintiffs, the company, ask for the following declarations and relief:—[His Honour read the extracts from the prayer of the amended bill, as above given:—]

Now, on the part of the Defendants, the harbour board, it is

contended that, under the circumstances, they were entitled, during each of the years which form the subject of this suit, to receive from the company the amount of the deficiency. They say, moreover, that they were under no obligation to make any demand. Now, not only is that contested, but it is the very essence of the Plaintiffs' case, that, if the demand had been made at the proper time, they would have had the means of providing for it or for so much as was justly due, and would have had the opportunity of inspecting the accounts of the commissioners; for although the direction to keep the books is no longer to be found in the Acts since the first Act of Parliament was repealed, yet, as a matter of fact, they would be entitled in this Court, and probably without resorting to this Court, to have an inspection of the books, in which alone that account could be kept.

It is clear to my mind, according to the construction of the Act of Parliament (and I say this as well for the Plaintiffs as for the Defendants), that the payment was to be an annual payment, and I repeat that it was plainly incumbent on the commissioners, if they had any demand whatever to make against the company, to have notified that to them at the end of every year, so as to enable the company to perform the obligations of the statute. That by the commissioners failing to make this demand the company's position has been prejudiced, is quite clear. The present owners of the shares are under no obligation or liability to pay; they have a right to consider that everything which was required to be done up to the present time, or when the demand commenced, has been properly done; and they are entitled to an annual payment just as the commissioners were.

The accounts have been made up annually; the shareholders have received what appeared to be their due, and they have received it only because the company have looked at their accounts, have ascertained the amount of money in their hands, have provided for all the payments which they had notice that they were bound to make, and have handed over all the rest. If laches can take place at all in such a case as this, here is an instance of the strongest possible laches. The test that is applied in order to ascertain whether laches has been committed or not is, whether the situation of the parties has been altered. That is the case here.

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The commissioners have in each and every year since 1843, I suppose—at all events since 1847—by making no demand, encouraged the company to do that which they must be taken to have known it would, in the absence of any demand being made by them, be the duty of the company to do, namely, to distribute the moneys they had in hand. But there is more than that, for during all the period of the litigation—whilst the commissioners were not convinced that they had any demand to make against the company, or whilst they thought that they had no right to enforce any such demand—they gave no notice of what might be the result of the proceedings under the mandamus. They were entirely silent on the subject.

Then it is said by the Defendants that the Plaintiffs must be taken to have known of the demand that was existing against them, for that in 1861, in a report issued to their shareholders, they spoke of the proceedings under the mandamus as existing. No doubt they did; but what they said was this: "Here is this claim being fought between certain members of the public and the commissioners of the port, but which, we are advised, can never be established;" and at that time, with the notoriety which that report must have given to the subject, no claim being made by the commissioners or any other persons, they proceeded to distribute the dividends. I say again, if standing by and permitting a person to alter his position does amount to laches, here I find it in the most abundant and clearest manner.

I am of opinion therefore that, for all those years over which the claim extends, the Defendants are clearly precluded by their acquiescence, and that, having regard to the terms of the Act of Parliament, and to the rights and duties which were incumbent on both parties, they cannot now enforce any claim against the Plaintiffs in respect of the twelve years from 1847 to 1858.

Then the question is, whether the Defendants can claim for the period between 1858 and 1870. I do not see anything, having regard to what has taken place in the case, that prevents their making the claim now in respect of the years from 1858 to 1870; and I say so particularly with reference to the letter of the 8th of October, in which there is a plain submission to pay whatever under the Act of Parliament is payable. I think, therefore, that

an account should be directed from the end of the year 1858 of the moneys which are payable under the Act of Parliament, that is to say, of such sum as shall be found to be the amount of the deficiency between the receipts of the commissioners of the port, and the £1000 which the company were bound to make up.

Then the only other question is, whether that account should be directed with wilful default. Now there have been three instances mentioned, in which it is said that the Defendants have been guilty of wilful default. No doubt, under the Acts of Parliament, the commissioners were at liberty to reduce their tolls. I do not find that they have ever done so; but I find that they have omitted to collect tolls which they might have received, and for this no excuse has been offered. If any excuse can be offered for having done this, the Defendants ought to be prepared also to shew that they did it with some notice to the Plaintiffs; because what the Plaintiffs have to do is to pay the deficiency, and the real amount of the deficiency can only be ascertained by finding out what has been, or might have been, received by the commissioners under their Act of Parliament. I think, to forego payment upon all parcels below 14 lbs. in weight, might be, and no doubt is, an injury to the Plaintiffs. It was right for the Defendants to reduce their tolls if they thought fit, but it was not within their powers, or within the provisions of the Act of Parliament, that they should omit altogether to receive some of the tolls, no matter for what reason. Possibly the interests of the pier and harbour, and of the docks, were and are very much complicated. There may have been reasons which induced the Defendants to do this, and they may have acted with perfect prudence with regard to their own rights; but they had no right to prejudice those of the Plaintiffs. I think that is one instance of wilful default.

Another is, that the bags of the passengers embarking and disembarking at the pier were exempted from toll. That is no reduction of the tolls, but it is a gratuitous act on the part of the commissioners, who happened, I believe, also to be interested in the pier, and who thought it a very good way to manage their business; but it is one for which the Plaintiffs are not to suffer.

The third instance of wilful default is, that they have chosen to grant leases of these tolls, instead of collecting them by their own

V.-C. B. 1872 SOUTHAMPTON DOCK COMPANY v. SOUTHAMPTON HARBOUR AND PIER BOARD.

servants. There is no power for that in the Act of Parliament. I have referred to the words by which they are empowered to take rents, and having those words clearly in my recollection, I can find nothing in the Act which justifies the Defendants in having farmed out at a rent the tolls which they themselves ought to have received. They could not do so without giving some advantage or bonus to the lessees. It may have reduced their expenditure in other ways—it may have saved the cost of collecting—it may have been prudent as they thought—but, as between themselves and the Plaintiffs, the Plaintiffs ought not to be prejudiced by it; and therefore I think that the account must be directed on the footing of wilful default.

The costs must necessarily be reserved.

There will be a declaration, that for the purpose of estimating the amount of the deficiency of income, the board ought to give credit for all sums which their predecessors might, or but for their wilful default might, have received; then a declaration that the Defendants are barred in equity from requiring the Plaintiffs to make good any deficiency which may have accrued previously to the 31st day of March, 1858; and then an account will be directed on the footing of those declarations.

Mr. *Cookson* asked that the Plaintiffs might be allowed to enter up satisfaction on the judgment. They had given judgment to be dealt with as the Court should direct; the action being in respect of items which the Court had now held to be outside the legitimate demands of the Defendants.

The VICE-CHANCELLOR said that until the account had been taken, it was impossible to say that something might not be coming from the Plaintiffs. He thought the judgment must be retained as a security for the balance, if any, that might be due from the Plaintiffs.

Solicitor for the Plaintiffs: Mr. *Henley Grose Smith,* agent for Messrs. *Sharp, Harrison, & Pocock, Southampton.*

Solicitors for the Defendants: Messrs. *Abbott & Co.*, agents for Messrs. *Hickman & Son, Southampton.*

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ACCUMULATIONS—*Construction—Distribution—Hotchpot.*] A testator who had been extensively engaged in business, after directing that his trustees should carry on his business for a period not longer than till his youngest child should attain twenty-one, and should then sell his business if it were not previously sold, and directing the sale and conversion and investment of his estate, and giving an annuity to his wife, empowered his trustees to apply "the whole or so much as they shall think fit of the annual income as a common fund for the maintenance, education, and bringing up, or otherwise for the benefit of my several children till the youngest shall attain twenty-one, in such manner as my said trustees or trustee shall judge expedient, accumulating the surplus income in aid of the common fund, and the income and accumulation shall follow the destination of the capital whence the same shall have arisen."—The capital of the estate was directed to be divided equally amongst all the children who attained twenty-one, or being daughters married under that age, except one son, for whom a different provision was made. By a codicil the testator recited that he had made advances to some of his children, and directed that all advances should be brought into hotchpot.—The youngest child had recently attained twenty-one, and the trustees having since the testator's death applied portions of the income for the maintenance and benefit of the children, and accumulated the rest:—*Held*, that the proper mode of distribution was to divide the whole accumulated fund equally among the children, they giving credit for sums allowed for maintenance with interest and for interest from the testator's death on advances made by him, the capital of the advances being to be brought into hotchpot on the division of the capital of the estate. HILTON *v.* HILTON 468

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ADVANCEMENT—*Legacies—Deductions from Residuary Bequest.*] A testator gave to three of his sons, *Thomas*, *John*, and *Peter*, legacies of £500 each, and to his daughter £200, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his said legacy of £500 without bringing such sums into hotchpot. The residue of his property he divided between his four sons, *Charles*, *Thomas*, *John*, and *Peter*, and his daughter. The testator had advanced to *Charles*, at different periods before the date of his will, £500, £170, and £58, and to *Thomas*, after the date of his will, £500 and £380:—*Held*, that the advances to *Charles* should not be taken into account against him, but that the £500 to *Thomas* was a satisfaction of his legacy, and the £380, being advanced after the date of the will, must be deducted from his share of the residue. *In re* PEACOCK'S ESTATE - - - - 236

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ANNUITY FOR LIFE OR PERPETUAL—*Will.*]—Testator devised and bequeathed all his property "of every description" to trustees "for the following uses, intents, and purposes, viz.": he left "the sum of £56 per annum to be paid quarterly to his wife," *H. R.* He gave to *A. L.* "the sum of £50 during her life." He left £800 per annum out of the proceeds of an East Indian estate, to be appropriated by his trustees to the maintenance and education of the eight children of his daughter, *I. H.*, wife of Captain *H.*, provided the children should take his name, "under forfeiture of" the £800 per annum should they decline to do so. If there should be an increased profit to £800 per annum, testator bequeathed the same as therein mentioned. If any of the children should die, their mother should have "the benefit of the deceased child or children's share or shares." The trustees should have the power, should any one of the children get into debt, to forfeit his share, and divide it with the other children. The trustees should have power to sell the East Indan estate, should the profits of the working not be sufficient to pay the annuities to the children; the proceeds of the sale to be invested in certain bonds, "in the names of the said trustees for the benefit of" the children. Should the profits not reach £800 annually from the working or sale of the estate, then the trustees should "charge the residue of" the testator's property to make up the said annual sum of £800. Should the sale realize more than enough, when invested, to pay the sums, the extra proceeds should be invested in the aforesaid bonds for the benefit of *I. H.*, but the sum to be paid to her from the said investment should not exceed £500 annually: —*Held*, that the annuity to the testator's widow was for life only; but that the annuities to the children of *I. H.* were perpetual. Hicks *v.* Ross. [141

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APPOINTMENT BY MARRIED WOMAN—*Trust Settlement — Appointment by Will — Execution of Trusts of Will.*] Under a settlement a sum of £10,000, secured by mortgage, was vested in trustees upon trust for *E. S.*, the wife of *W. S.*, for her life, and after her death for *W. S.* for his life, and subject as aforesaid, upon trust for such persons as *E. S.* should by deed or will appoint, and in default of appointment for *W. S. E. S.* made a will, by which she directed that *W. S.* should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after the death of *W. S.*, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to *W. S.*, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to *W. S.*; and part of the £5000 applicable to the payment of the pecuniary legacies was lost by him: —*Held*, that the payment to *W. S.* was proper, and that the trustees were not answerable for the loss. Hayes *v.* Oatley - - - 1

APPOINTMENT BY RESIDUARY GIFT—*Settlement—General Bequests by Will of prior Date—Contrary Intention—Wills Act, s. 27.*] By a settlement dated the 6th of January, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:—*Held*, that although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court had power in construing both instruments to consider the surrounding circumstances, which shewed that the settlor never intended the settlement to be revoked by a prior will; and that consequently the will was not an execution of the power. *In re* Ruding's Settlement - 266

APPOINTMENT BY WILL—*Power*—"*Instrument in Writing*"—*Delivery*—*Publication.*] A power given to *A.* to appoint by any deed or instrument in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of two or more credible witnesses:—*Held*, to be well exercised by an appointment by the will of *A.*, not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published, and acknowledged and declared to be her last will," in the presence of the attesting witnesses. Smith *v.* Adkins - - 402

APPORTIONMENT OF DIVIDENDS—*Tenant for Life and Remainderman—Will—Apportionment Act*, 1870.] Testator, as to his share and interest in the *L. Company*, bequeathed the dividends and income thereof to *A.* for life, and gave his residuary estate on other trusts. He died on the 21st of October, 1870. In February, 1871, a dividend was declared by the company in respect of the profits of the year ending the 1st of January, 1871:—*Held*, that *A.* was entitled to the whole dividend, and that it was not apportionable under 33 & 34 Vict. c. 35, s. 2, as between *A.* and the residuary legatees. Jones *v.* Ogle - 419

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ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*Bankruptcy—Payment by Assignee of Bills accepted by Bankrupt — Substantial Advance — Act of Bankruptcy.*] Payment of bills by the drawer at the request of the acceptor, who, in consideration thereof, assigns to the drawer all his property to secure the amount and also certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy. — Therefore, where, at the request of *T., I., M., & Co.* paid the amount due on certain bills drawn by them and accepted by *T.*, and *T.* assigned to them his interest in certain marine engines and machinery (which constituted his whole property) as security for the moneys due on the bills, and also for other moneys due from him to them :—*Held*, that the assignment was not an act of bankruptcy. *Ex parte* Reed & Steel. *In re* Tweddell - 586

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BANKERS' ACCOUNT—*Wife's Separate Estate—Bankers' Account in Name of Wife — Executrix Account.*] A wife being executrix of her father paid the moneys she received into a bank in her own name as such executrix. The husband, it was alleged, sometimes paid in money to this account, and the wife paid cheques to her husband's creditors. The account remained for six years, when the husband died and the wife died shortly afterwards :—*Held*, that if the money, or any part of it, belonged to the husband, he had shewn an intention of making a gift of it to his wife, and it constituted part of her estate at the husband's death. Lloyd *v.* Pughe - 241

BANKERS' LIEN—*Deposit of Securities for Bills under Discount—Prescribed Form of Mortgage by a Company.*] A company deposited title deeds with a bank "as collateral security for bills under discount." At the time the company was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, and the securities realized more than was sufficient to cover the latter bills :—*Held*, that the company could effect a mortgage by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mortgage deeds; that the bankers were not in the position of officers of the company, who were bound to see that the required formalities were complied with, and that the bank was entitled to hold the balance of the proceeds upon the sale of the securities, to meet the whole amount due to them by the company. *In re* General Provident Assurance Company. *Ex parte* National Bank - - - 507

BANKRUPT PLAINTIFF—*Pleading—Demurrer—Charges of Fraud—Costs of Suit.*] An uncertificated bankrupt is incapable of suing in Chancery, though the bill charges fraud against all the Defendants, including amongst them the creditors' assignee.—Observations on demurring to a bill by an uncertificated bankrupt, charging personal fraud.—Bill dismissed, but, inasmuch as the charges of fraud (which had been answered) were held to have been sustained, without costs. Motion *v.* Moojen - - - - 202

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BORROWING POWERS—*Special Case—Income and Capital—Interest on unproductive Capital—Statutory Jurisdiction—Sir G. Turner's Act* (13 & 14 *Vict. c.* 35, *s.* 1) — *Practice — Representative Parties to Special Case.*] A company incorporated by Act of Parliament, being already in possession of works constructed by means of capital raised by the issue of shares, obtained by a later Act power to raise more capital for the construction of additional works. These works were of a peculiar kind, and could not be constructed by means of contracts taken in the usual way, but required that the company should find the plant and employ workmen to act as directed by their engineer. The capital for the works was raised by the exercise of borrowing powers and by preference shares, the holders of which had certain options to convert them into ordinary shares :—*Held*, that the company were entitled to add to the capital required for the construction of the works the amount of the interest or dividends on the loans or shares by means of which it was raised until the completion of the works.—The Court heard a special case, under *Sir G. Turner's Act*, to determine questions arising between classes of persons respectively represented by one of them on behalf of all others in the same position. Bardwell *v.* Sheffield Waterworks Company - 517

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COLOURABLE IMITATION—*Copyright—Infringement—Injunction.*] The Plaintiff, the publisher of a work which he claimed to have originated, called "*The Birthday Scripture Text Book*," consisting of a printed diary interleaved, with a blank space opposite each day with a text of Scripture

COLOURABLE IMITATION—*continued.*

appended, and which was designed as a record of the birthdays of friends:—*Held*, entitled to an injunction to restrain the Defendants from publishing and selling a work subsequent to the Plaintiff's, called "*The Children's Birthday Text Book*," on the ground that it was an infringement of the Plaintiff's copyright in the title of his work, as well as a colourable imitation of the same. Mack *v.* Petter - - - - - 431

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COMPENSATION FOR INCOME—*Statutory Corporations—Right to have Income made up to a certain Sum—Annual Demand—Laches—Account—Wilful Default.*] Upon the establishment in 1836 of a dock company, it was enacted that, in order to indemnify the commissioners of a neighbouring harbour for loss of income, the company should pay to the commissioners such annual sum as should make up the income of the latter to the average of the three next preceding years. Afterwards, in 1843, the above enactment was repealed, and in lieu of making up an average, it was enacted that the company should pay to the commissioners every year the deficiency by which the yearly income of the latter should fall short of £1000.—In 1860, up to which time no demand had been made by the commissioners against the company, a mandamus was issued at the suit of a third party against the commissioners commanding them to take the necessary steps for recovering from the company payment of certain alleged deficiencies in their income, extending over twelve years, from 1847 to 1858 inclusive; and (the mandamus having in 1870 been finally declared to be valid) in June,

COMPENSATION FOR INCOME—*continued.*

1870, a demand in respect of the alleged deficiencies from 1847 to 1858 was first made upon the dock company by the harbour board (who had succeeded to the commissioners). This was followed by an action for the amount. Upon bill by the company in November, 1870, to restrain the action, and for declarations that in estimating the amount of the deficiencies the board were liable to give credit for all sums which their predecessors might, but for their wilful default, have received; and that the board were debarred from requiring payment of any deficiencies prior to 1870:—*Held*, that it was part of the duty of the commissioners year by year to have demanded from the company payment of any sum that might have been due to them from the company under the statutes; and that by the laches of their predecessors the board were now debarred from calling upon the company to pay for any deficiencies prior to 1858:—*Held*, further, that the board were not debarred from calling upon the company to pay deficiencies since 1858; and hence that the company were entitled to an account from the board of their income since that date, charging wilful default.—The harbour commissioners, in the exercise of their discretion, had permitted certain small articles, on which they were empowered by statute to levy duties, to pass free of duty. They had also leased their tolls, having no statutory power to do so:—*Held*, as between the dock company and the harbour board, that these were acts of wilful default. Southampton Dock Company *v.* Southampton Harbour and Pier Board - - - - - 595

COMPENSATION FOR SALARY—*Company—Stipulation for Payment of Manager on Dismissal—Resolution to wind up—Right of Proof.*] By articles of association of a company it was provided that, in case of the dismissal of *S.*, the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the company, and *S.* was appointed liquidator. *S.* had paid £2000 on his shares, and received £400 for remuneration as liquidator:—*Held*, that the winding-up was equivalent to a dismissal of *S.*, and that he was entitled to prove in the winding-up for £2000, subject to a set-off of the £400. *In re* Imperial Wine Company. Shirreff's Case - 417

COMPETITIVE EXAMINATION—*Charity Scheme—Scholarship—Preference cæteris paribus—Test or Competitive Examination—Qualification of Candidates—Election by Trustees.*] By a scheme for a charity connected with a grammar school at *G.* it was provided that the income should be applied towards the maintenance of a scholar at the university, such scholar to be the child of any resident of the town of *G.*, preference being given, *cæteris paribus*, to the son of a freeman of *G.*, such scholar having been taught and fitted for the university at the said school, and tried and examined in Greek and Latin, and approved by certain examiners, whose examination and approbation should be delivered to the trustees, who should thereupon proceed to elect a scholar qualified as aforesaid. On a vacancy there were two candidates, *A.*, the son of a freeman, and *D.*, the son of a non-freeman. The examiners reported to the

COMPETITIVE EXAMINATION—*continued.*

trustees that *D.* was far superior in every respect, but that they believed that *A.*, if admitted to the university, would be able in due time to pass the required examinations. The trustees elected *A.* to the scholarship. On a petition by *D.* praying that the examination might be set aside:—*Held*, that the scheme did not provide for a test, but a competitive examination; that the trustees should, under the circumstances, have followed the recommendation of the examiners; that the election must be set aside, and *D.* elected to the vacant scholarship. *In re* Nettle's Charity - 434

CONDITIONAL APPOINTMENT—*Appointment—Limited Power succeeded by General Power—Implied Gift—Conditional Exercise of Power—"Nearest of Kin" of a Married Woman.*] A testator gave his residuary estate to trustees upon trust for his daughter for life, and after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, and in default of appointment as she should by deed or will generally appoint, and in default of appointment under that power to her nearest of kin, according to the Statutes of Distribution. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—*Held*, first, that there was an implied gift to the objects of the first power in default of appointment; secondly, that if not, the appointment was conditional on there being no children, and they took as nearest of kin as in default of appointment. *In re* Jefferys' Trusts 136

CONDITIONS OF SALE—*Vendor and Purchaser—Particulars—Description of Property—Costs—Lien for the Deposit on Property sold.*] Where property is sold by auction it is the office of the particulars to give an accurate description of the property, and of the conditions to state the terms on which the sale is made.—Therefore, where certain property was put up for sale, and in the particulars, which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady then in her seventieth year; and by the conditions of sale, which were read for the first time at the auction, just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, on bill filed by the purchaser at the auction, who stated he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:—*Held*, that although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a decree for the rescission of the contract and for a return of the deposit with interest, and a declaration of lien:—*Held*, also, that though in an ordinary case, inasmuch as the Plaintiff's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale.—The Court looks with disfavour on the practice of not producing the conditions of

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See Mortgage of Shares.
—— Paid-up shares - - - - 387
See Payment by Money's Worth.
—— Qualification of director - - 316
See Directors' Qualification.

CONVERSION—*Vesting of Shares before Appointment.*] Husband and wife had a joint power of appointment over real estate amongst the children of the marriage. In default of appointment, the estate was to be held, subject to the parents' life interests, in trust for all the unappointed children, the shares to vest at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for sale.—A son attained twenty-one and died intestate. Afterwards the husband and wife appointed two fourths of the real estate, and declared that the shares of the persons beneficially interested in the capital arising from any sale of the premises should be of the quality of personal estate. A sale having taken place under the power in the settlement:—*Held*, that the interest of the heir of the deceased son was defeated by the conversion. Webb *v.* Sadler - - 533

CONVEYANCE—Fraudulent—Against creditors [106, 151, 184, 190
See Fraudulent Conveyance. 1—4.
COPYRIGHT—Advertisement—Illustrated catalogue - - - - 407
See Copyright in Advertisement.
—— Colourable imitation - - - 431
See Colourable Imitation.

COPYRIGHT IN ADVERTISEMENT—*Injunction — Copyright—Illustrated Catalogue — Advertisement—Costs.*] There is no copyright in a descriptive advertisement, illustrated, or otherwise, of articles which any one may sell.—Where an upholsterer, who had published an illustrated furnishing guide with engravings of the articles which he sold, and descriptive remarks thereon, filed a bill to restrain the Defendant, another upholsterer, from publishing, for the purposes of his own trade, a similar work in which many of the said engravings and portions of the letterpress of the first work were alleged to be copied:—*Held*, that the Defendant could not be restrained by injunction from so copying the Plaintiff's illustrations, or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the Defendant's work being a flagrant imitation of the Plaintiff's, he could be allowed no costs. Cobbett *v.* Woodward - - - - 407

CORPORATION — Statutory — Compensation for loss of income - - - 595
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COSTS—Administration suit - - 379
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—— Bill by uncertificated bankrupt - 202
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—— Payment out of Court—Special Act - 227
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—— Taxation of - - - - 224
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—— Vendor and Purchaser—Rescinded contract
See Conditions of Sale. [124
—— Winding-up—Liquidator - - 278
See Costs of Liquidation.
—— Winding-up—Witness - - 8
See Witness in Winding-up.

COSTS OF LIQUIDATION—*Winding-up—Personal Liability of Liquidator.*] A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him in the affairs of the liquidation for any of the costs of such liquidation. *In re* Trueman's Estate. Hooke *v.* Piper - - - 278

COSTS UNDER SPECIAL ACT—*Petition for Payment out of Court—Reinvestment in Land—Application to other purposes.*] Where, under the provisions of local Acts which authorized the taking of land and the application of the purchase-money in the purchase of other land, or in the case of the parties interested being under disability towards the discharge of incumbrances upon land settled to the same uses as that taken, and provided for the payment by the parties taking the land of the costs of a reinvestment in land:—*Held*, that where a petition for payment out of Court of money paid in under the Act asked to have it applied towards paying off incumbrances on other land settled to the same uses, there was liability to pay the costs of the Petitioners. *In re* Lord Stanley of Alderley's Estate - 227

COUNSEL'S FEES — Refreshers — Common law scale - - - - - 224
See Taxation of Costs.

COUNTY COURT JURISDICTION—*Appeal from County Court—Transfer to Court of Chancery*—28 & 29 *Vict. c.* 99, *s.* 9.] A plaint in the County Court for the administration of an estate, stated that the value of the property did not exceed £500. At the hearing an application, of which notice had been given, was made by the Defendant that the plaint might be struck out, on the ground that the estate exceeded £500: and the Court had consequently no jurisdiction. The Judge, after hearing evidence in proof of the excess of value, ordered the suit to be transferred to the Court of

COUNTY COURT JURISDICTION—*continued.*
Chancery, under the 9th section of the *County Court Act.*—*Held* (affirming the order), that the suit was "in progress" within the meaning of the 9th section; and the value of the property appearing to be under £700, directions were given that the suit should be proceeded with in Chambers, as upon an administration summons. Birks *v.* Silverwood - - - - - 101

CREDITORS' SUIT—Evidence of debt - 438
See Judgment against Executors.

CROWN—Petition of Right—Parties - 558
See Petition of Right.

CY-PRÈS—*Petition — Charity — Information — Fund raised by Subscription—Interest of Petitioner in Charitable Fund—Opposition of Attorney-General—Original Purpose of Fund.*] Where a charitable fund has, on the object for which it was provided becoming incapable of being carried out, been applied *cy-près* to an object in itself beneficial, the Court will not subsequently change the application, even to a purpose identical with its original object, unless satisfied that the proposed application will be as beneficial as the existing one.—*Semble*, that when a scheme has been once settled for the application of a charitable fund, an alteration in it can only be made on the application of the Attorney-General, or at all events with his consent.—A fund was subscribed for the purpose of providing a place of public worship in *London* for persons coming from the Highlands of *Scotland* who could not speak English, where Divine Service should be performed in the Gaelic language:—*Held*, that persons who could not speak the English language in such manner as to enable them to attend with advantage a place of public worship where the English language was spoken were objects of charity. But the fund having been applied *cy-près* to the purposes of the *Caledonian Asylum* under a scheme settled in an information in consequence of the impossibility of finding a minister to conduct the service in the Gaelic language, or a sufficient number of persons to attend such services, although it now appeared on a Petition by some natives of the Highlands of *Scotland*, who alleged that they desired to attend a service in the Gaelic language, that a duly qualified Scotch clergyman could be found to conduct the service, the Court, not being satisfied upon the evidence that there were persons in *London* who were properly objects of the charity, or would attend the service if established, refused to alter the existing scheme. Attorney-General *v.* Stewart - - - - - 17

DEATH BEFORE DATE OF WILL—Substitutional gift to children - - 246
See Gift, Original or Substitutional.

DEATH BEFORE TESTATOR—*Will—Gift of Residue to Legatees named, and to their Executors, Administrators, and Assigns—Declaration that the Shares should be Vested on Execution of Will—Lapse.*] Testator gave, by will, the residue of his estate to trustees to pay and transfer the same unto seven legatees named, in equal shares as tenants in common, and their respective executors, administrators, and assigns, to whom he bequeathed the same accordingly; and he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women should be for their separate use:—*Held*, on demurrer, that the share of one of the legatees—a married woman—who died after the date of the will but before the testator, did not belong to her husband, her legal personal representative, but that it had lapsed. Browne *v.* Hope - - - - 343

DEBT—Revival of - - - - 484
See Revival of Debt.

DEFEATING AND DELAYING CREDITORS—Voluntary settlement 106, 151, 184, 190
See Fraudulent Conveyance. 1—4.

DELAY—Family arrangement—Liability of trustees - - - - - 167
See Family Arrangement.

—— Compensation for loss of income caused by statutory corporation - - 595
See Compensation for Income.

DELEGATED POWER - - - 397
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DELIVERY OF DEED - - - 402
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DEMURRER—Bill by uncertificated bankrupt 202
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DEPOSIT—Lien for—Rescinded contract - 124
See Conditions of Sale.

DIRECTOR—Powers of - - - 322
See Powers of Directors.

—— Qualification of - - - 316
See Director's Qualification.

DIRECTOR'S QUALIFICATION—*Winding-up—Contributory.*] Articles of association provided that no person should be capable of serving as a director unless at the time of his appointment he should hold twenty-five shares. On the 14th of February, 1867, the directors of the company were appointed, and at the same time it was resolved to allot twenty-five shares to each of the persons named as directors. *A.*, one of these persons, had consented to act as director; but in ignorance, as he stated, that any shares had been allotted to him, and under the mistaken impression that the necessary qualification was twenty £25 shares, and not twenty-five £20 shares, applied on the 1st of March, 1867, for twenty shares, which were allotted to him. He attended meetings and continued to act as director until October, 1867, shortly after which the company was ordered to be wound up:—*Held*, that he was liable, not only for the twenty shares for which he had applied on the 1st of March, but also for the twenty-five which were allotted to him as his director's qualification, pursuant to the articles of association, on the 14th of February, 1867. *In re* British and American Telegraph Company. Fowler's Case [316

DISCOVERY—Production of documents 477, 580
See Production of Documents. 1, 2.

—— Relevancy to relief prayed - - 25
See Discovery relevant to Relief.

DISCOVERY RELEVANT TO RELIEF—*Exception to Answer—Settled Accounts—Partnership Suit.*] A suit was instituted by one of two partners against the other, praying for a dissolution

DISCOVERY RELEVANT TO RELIEF—*contd.*
of the partnership, and for the usual partnership accounts. The bill set out the partnership deed, which stated that a sum of £6000 had been brought into the business by the Defendant, and alleged that the statement to that effect was erroneous; but there was no prayer that the account as to the £6000 should be opened or the deed set aside. The Defendant by his answer stated that the account, as regarded the £6000, was treated as a settled account at the date of the partnership deed, and he declined to set out the items of which it was composed, and claimed the benefit of his defence as if he had pleaded or demurred: —*Held*, on exception to the answer, that the discovery sought as to how the £6000 was made up was not relevant to the relief prayed, and that the Defendant was not bound to answer the whole bill, but might refuse to give the discovery without being required to plead to the bill. Wier *v.* Tucker - - - - - 25

DISCRETION—Court—Winding-up petition 441
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—— Trustees—Application of charitable funds
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DISSOLUTION OF PARTNERSHIP — Unsaleable asset - - - - - 427
See Partnership Accounts.

DIVIDENDS — Shares in company — Apportionment - - - - - 419
See Apportionment of Dividends.

DIVORCED WIFE—*Marriage Settlement—Trust for Wife if she survived her Husband—Dissolution of Marriage.*] By a marriage settlement the wife's property was vested in trustees upon the usual trusts, and if there should be no issue of the marriage (which was the case) it was to be in trust for the wife, her executors, administrators, and assigns, in case she survived her husband. On the wife's petition the marriage was dissolved:—*Held*, that she was absolutely entitled to the property. Fussell *v.* Dowding - 421

DOMICILE—Scotch—Succession to property in *India* - - - - 60
See Indian Law.

DYING WITHOUT ISSUE — Remoteness — Will made before 1838 - - - 283
See Remoteness.

EJECTMENT— Mesne profits - - 503
See Mesne Profits.

EQUITY TO A SETTLEMENT—*Sufficient Maintenance—Marital Rights*] The Plaintiff filed a bill to establish her equity to a settlement of £6000, which accrued to her absolutely during her coverture. The husband, on the marriage, which took place in 1862, gave up an income of £400 a year at the desire of his wife, but he had no property and made no settlement. Subsequently to the marriage sums amounting to £56,000 consols were settled by the wife's mother and relatives upon her for life for her separate use, with remainder as to £200 a year for her husband for life, and subject thereto for the children. From 1862 she allowed her husband £100 a year till 1865, when he left her, and they had not since resided together. In 1870 the wife agreed, under pressure

EQUITY TO A SETTLEMENT—*continued.*
of a suit by the husband for restitution of conjugal rights, to allow him £300 per annum. She had saved out of her income £1000 a year for six years. There were two children, who were supported by the wife:—*Held*, that the wife being amply provided for, and there being no proof of misconduct on the part of the husband, the Court would not interfere with his marital rights, and bill dismissed with costs. Giacometti *v.* Prodgers - 253

ESTATE FOR LIFE OR IN TAIL—*Construction of Will.*] A testator devised a freehold estate to trustees upon trust to permit his son, *G. A.*, and his assigns to receive the rents, issues, and profits during his life, and after his death upon trust to permit the first son of *G. A.* and the heirs male of his body to receive the rents, &c., during their respective lives severally and successively in tail male:—*Held*, that the first son of *G. A.* took an estate tail in the property, and not merely a life estate. Hugo *v.* Williams - - - 224

ESTATE TAIL BY IMPLICATION—*Will.*] Direction that any property might be sold except *Glencoe*, which was to remain in the family as long as there was a lineal son descendant of before-named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:—*Held*, that this clause created an estate tail in possession in the eldest-named son. Mannox *v.* Greener 456

EVIDENCE — Debt — Creditor's suit — Judgment against executors - - - 438
See Judgment against Executors.

—— Injunction—Infringement of trade-mark
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See Statutory Declaration.

—— Wrongful possession — Action for mesne profits - - - - 503
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EXAMINATION—Grammar school—Exhibition to university - - - - 434
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EXCEPTIONS TO ANSWER—Discovery—Settled account - - - - 25
See Discovery relevant to Relief.

EXCESSIVE APPOINTMENT—*Power—Delegated Power—Validity of Subsequent Appointment to Objects of Power.*] Where the donee of a power appointed by will a life interest to *M.*, an object of the power, and then delegated to *M.* a power to appoint a life interest to a stranger to the power, and subject thereto appointed the property to the children of *M.*, who were objects of the power:—*Held*, that the delegated power was void, but that the subsequent appointment was good. Carr *v.* Atkinson - - - - - 397

2. —— *Marriage Settlement—Power of Appointment—Invalid Exercise of Power—Extent of Invalidity.*] Husband and wife, having a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed part of the fund to trustees upon such trusts as *H.* (one of the sons) should by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of the father's will, or

EXCESSIVE APPOINTMENT—*continued.*
by will appoint; and in default of such appointment, upon trust for *H.* for life, or until bankruptcy or assignment; and after *H.*'s death, upon trust for his executors or administrators; but if such interest should have determined, upon such trusts as would have affected the property if the same had been appointed to *H.* during his life, or until such determination only:—*Held*, that the above appointment was valid only to the extent of giving to *H.* an estate for life, or until bankruptcy or assignment; and that, as to all the rest, it was void. Webb *v.* Sadler - - 533

EXECUTOR—Account at bankers—Married woman - - - - - 241
See Bankers' Account.

—— Action against, for mesne profits - 503
See Mesne Profits.

—— Appointment of, by married woman - 1
See Appointment by Married Woman.

—— De son tort - - - - 262
See Executor de son Tort.

—— Intestacy as to residue - - - 275
See Executor taking beneficially.

—— Retainer - - - - - 379
See Specialty Debt.

EXECUTOR DE SON TORT—*Administration—Plea that Defendant was not Administratrix.*] A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the Defendant, the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the Defendant, who was "the only legal personal representative and also heir of the undisposed of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased:—*Plea*, that the Defendant was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased:—*Held*, that if the Defendant was not administratrix, she was executrix *de son tort*, and the bill could be sustained.—Plea ordered to stand for an answer, with liberty to except. Rayner *v.* Koehler - - - - - - 263

EXECUTOR TAKING BENEFICIALLY—*No Residuary Bequest—Executors—Intestacy as to Residue.*] A testator appointed two of his sons executors, and gave various legacies, but made no residuary bequest. By a codicil he directed his two executors and three of his principal legatees to pay all expenses attending the proving of his will, and administration and winding-up of his estate, in equal proportions, according to the nature of the property they derived under his will and codicil, it being his express desire that no part of such expenses should be borne by the residuary legatees, but that they should receive the residue free of all deductions for expenses:—*Held*, that the appointment of executors had no operation as to the beneficial disposition of the residue; and that being undisposed of by the will, the codicil left the matter in the same position, and there was an intestacy as to the residue. Travers *v.* Travers [275

EXHIBITION TO UNIVERSITY - - 434
See Competitive Examination.

FAMILY—Gift to surviving children or their families - - - - 160
See Survivorship.

FAMILY ARRANGEMENT—*Trustee and Cestui que Trust—Release by Married Woman—Recital—Settled Account—Lapse of Time—Liability of Derivative Trustees.*] A testatrix died in 1848, having by her will, made the day before her death, bequeathed one-fourth of the residue of her personal estate to two of her sons, in trust for her daughter *A.*, then the wife of *R. D. T.*, for her life, for her separate use, without power of anticipation; and on her death for her children; but did not appoint any executors of the will. The testator left four children. In 1850 a family arrangement was entered into by which the property was divided into fourths. Certain securities were then appropriated to meet the share of *A.* Her fourth and that of one of her brothers (a trustee) were calculated on the footing of their having each received £400 from the testatrix in her lifetime; which sum was accordingly deducted from their respective shares. The brother (the trustee) died in 1860. *A.* died in 1870, having received the interest on her share, less the £400. The legal personal representatives of the then trustees of the will declined to make good to the children of *A.* the difference between the value of one-fourth part of the estate and the amount actually set apart to answer the bequest in favour of *A.* and her children. They justified that refusal by producing a release, executed in 1860, by *A.* (but not by her husband), containing a recital to the effect that the £400 had been advanced by the testatrix to *A.* in her lifetime, with her husband's consent, "in part of and to be deducted out of any legacy or sum of money which the testatrix might leave by will to *A.* or her issue;" and the accounts of the testatrix's estate, in the hands of her solicitors, to shew that a sum of £400 had been advanced to *A.* as stated. Upon a bill filed in 1871 by the children of *A.* against the legal personal representatives of the original trustees to compel them to pay the amount of the difference in question:—*Held*, that the Plaintiffs were entitled to a decree, with costs up to the hearing. Taylor *v.* Cartwright 167

FANCY NAME - - - - 542
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FORMAL WORDS—Answer - - - 71
See Informal Answer.

FRAUD—Charges of—Bankrupt plaintiff—Demurrer - - - - 202
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—— Conveyance in fraud of creditors 106, 151, [184, 190
See Fraudulent Conveyance. 1—4.

FRAUDULENT CONVEYANCE—*Voluntary Settlement—Creditor's Suit—Settlor about to engage in Trade—Liabilities incurred since Date of Settlement—13 Eliz. c. 5—Inspectorship Deed—Release—Concealment.*] A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the

FRAUDULENT CONVEYANCE—*continued.*

settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect.—Where a voluntary settlement is made on the eve of the settlor engaging in trade the burden rests upon him of shewing that he was in a position to make it.—In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to shew that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.—A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed. Mackay *v.* Douglas. **106**

2. —— *Voluntary Settlement—Suit to set aside—Bankruptcy—Costs.*] After bill filed on behalf of creditors to set aside as fraudulent and void a voluntary settlement by *A.*, their debtor, and a composition signed by the creditors in ignorance of such prior voluntary settlement, the debtor was adjudicated bankrupt, and an order was made by the Court of Bankruptcy setting aside the voluntary settlement. Plaintiffs, whose claim to prove under the bankruptcy had been admitted notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, and that Plaintiffs' costs should come out of the estate. The trustees declined this proposal, but offered to consent to an order staying all proceedings in this suit without costs, or dismissing the bill without costs:—*Held*, that upon the bankruptcy of *A.* the trustee in bankruptcy should have applied to the Court to have stopped the suit, which, though rightly instituted in the first instance, could no longer be prosecuted with benefit to the creditors, and that Plaintiffs were entitled to the costs of suit up to the date of their letter to the trustees of the settlement, out of the estate realised in bankruptcy, and the trustee in bankruptcy to the costs only of realising the estate:—*Held*, also, that the trustees of the settlement, who, by their refusal of Plaintiffs' offer, had compelled them to bring the suit to a hearing, must pay all Plaintiffs' costs incurred since the date of that offer. Tanqueray *v.* Bowles - - - **151**

3. —— *Voluntary Settlement—Pecuniary Gifts—13 Eliz. c. 5—Creditors' Suit—Consideration.*] A distribution by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts:—*Held*, void as against creditors under the 13 Eliz. c. 5, the Court being satisfied on the evidence that the children were aware at the time that the creditors' claims would be defeated though it did not appear that the debtor had any such intention. Cornish *v.* Clark. - - - - - **184**

4. —— *Voluntary Settlement—Defeating Creditors—13 Eliz. c. 5.*] In the absence of actual intent to defeat, delay, or hinder creditors, a

FRAUDULENT CONVEYANCE—*continued.*

voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid. Kent *v.* Riley - - - - - - **190**

FREIGHT—Assignment of—Priority - **32**
See Mortgage of Ship.

GAELIC LANGUAGE—Divine service—Charitable scheme - - - - **17**
See Cy-près.

GIFT, ABSOLUTE OR IN TRUST—*Will—Construction—Bequest to a Married Woman for Separate Use—Proceeds to be applied to bringing up and maintenance of Legatee's Children.*] Testator devised all the rest, residue, and remainder of his real and personal estate to *S. M.*, a married woman, her heirs and assigns, for ever; but upon trust, "as to all the freehold," as he proceeded to declare; "and as to the personal property so given as aforesaid to the said *S. M.*, to and for her own proper use and benefit for ever," separately from her husband, "and the proceeds to be applied by her in the bringing up and maintenance of" all her children.—*S. M.* died leaving several infant children:—*Held*, that she took an absolute interest in the personalty, unaffected by any trust. Mackett *v.* Mackett - - **49**

GIFT OF INCOME—*Will.*] Devise to sons and daughters of an equal share in all the income of real property:—*Held*, that the devise of the income of the estate passed the fee. Mannox *v.* Greener - - - - - **456**

GIFT ON ATTAINING TWENTY-ONE—*Will—Marriage under Twenty-one—Absolute Interest on attaining Twenty-one.*] A testator gave the residue of his estate in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest, leaving issue, their shares to go to their children, with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for such daughter for life, and afterwards for her children:—*Held*, that the daughters who had attained twenty-one, and had not married, were entitled to the whole of their shares absolutely. *In re* Dowling's Trusts - - - **463**

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Construction of Will — Death of Original Legatee before Date of Will — Substitutionary Gift to Children.*] A testator bequeathed to his sister *Susan* all the property he might die possessed of for life, and after her decease he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the lifetime of his sister *Susan*, the share which would have been theirs to be equally divided among their children:—*Held*, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent. —*In re Potter's Trust* (Law Rep. 8 Eq. 52) followed. Adams *v.* Adams - - - **246**

GIFT TO WIFE AND CHILDREN—*Will—Share to be secured for Children of E. and their Mother—Settlement or Joint Tenancy.*] Testator directed that a share of his property, upon the death of the husband of his daughter *E. H.* (which happened), should be secured for the benefit of the children of *E. H.*, and for that of their mother:—*Held*, that the share must be settled upon *E. H.* for her life with remainder to her children. Combe *v.* Hughes - - - - - 415

GRAVESTONE—Trust to maintain - 45
See Trust of Uncertain Amount.

"HOSPITAL"—*Will—Charitable Gift—"Hospital" held to mean a general as distinguished from a special Hospital.*] Gift by will to the *Kent County Hospital*. There being no hospital having precisely that name:—*Held*, that a general hospital must be presumed to have been intended, and the *Kent County Ophthalmic Hospital* could not take the legacy, and that it must be divided between two hospitals—viz., the *Kent and Canterbury Hospital* and the *West Kent General Hospital*, which together supplied the place of a general county hospital. *In re* Alchin's Trusts. *Ex parte* Furley. *Ex parte* Earl Romney - - 230

HOTCHPOT CLAUSE—*Will—Construction.*] Testator gave real and personal property to trustees upon trust to convert, and after the death or second marriage of his wife, to hold the proceeds in trust for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks, and not to the number of the individuals composing the class.—His real estate was to be considered as converted from his death, and it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate in the trust property without bringing the portion so paid in testator's lifetime into hotchpot.—On the marriage of *B.*, one of his daughters, in his lifetime, and before the date of the will, testator covenanted to stand seised of a freehold house to the use of *B.*, her heirs and assigns, for ever. *B.* having died leaving issue:—*Held*, that the hotchpot clause could not be extended to the issue of testator's children, so that the value of the house given to *B.* was not to be deducted from the share of her issue who should be living at the death or second marriage of testator's widow. Hewitt *v.* Jardine - 58

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—— Dissolution of marriage — Property of divorced wife - - - 421
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INCOME AND CAPITAL—Borrowing powers of company - - - - 517
See Borrowing Powers.

INDIAN LAW—*Indian Succession Act*, 1865 (*Act X. of* 1865)—*Will—Moveable and Immoveable Property in India—Scotch Domicil—Charitable Legacy—Marshalling.*] By the *Indian Succession Act*, 1865, succession to the immoveable property in *India* of a deceased person is regulated by the law of *India*, wherever he may have had his domicile at the time of his death; and succession to the moveable property in *India* is regulated by the law of the country of the domicile. By the same Act no man having a nephew, or niece, or nearer relation has power to bequeath "any property" to charitable uses, except by a will executed twelve months before death, and deposited as therein required.—A domiciled Scotchman, possessed of both moveable and immoveable property in *India*, made a will in *Scotland*, appointing both Indian and Scotch executors, and duly executed the same according to the law of both countries. He thereby devised and bequeathed all his Indian property, moveable and immoveable, to the Indian executors upon trust to sell and realize, and after payment of costs and expenses, out of the free proceeds to pay £10,000 sterling to the Scotch executors, and to pay the residue to legatees. He then directed his Scotch executors to lay out the £10,000 legacy in erecting and maintaining a hospital in *Scotland*. The testator died in *Scotland* a few days after the date of the will, leaving sisters. The moveable and the immoveable property in *India* each exceeded £10,000.—It being in evidence that there is no rule against marshalling in favour of charities known to the law of *Scotland*:—*Held*, that the £10,000 might be well paid out of the moveable property only; and that the distribution of such moveable property being by the law of *India* regulated by the law of *Scotland*, the whole legacy was well given to the charity. Macdonald *v.* Macdonald - 60

INFANT — Administrator *durante ætate minore* [423
See Administrator durante minore ætate.

—— Maintenance — Charge on reversionary interest - - - - 251
See Maintenance of Infants.

INFANT TRANSFEREE—*Winding-up—Contributory—Liability of past Shareholder—Companies Act*, 1862, *s.* 38.] *G.*, a shareholder in a limited company, transferred his shares to *A.*, an infant, more than a year before the company was wound up. *A.* transferred to *D.*, also an infant, who transferred to *B.* three months before the wind-

INFANT TRANSFEREE—*continued.*
ing-up. The transfers were all registered. *B.*, who was *sui juris* at the date of the transfer, afterwards became bankrupt:—*Held*, that *G.* continued liable as a member till *B.'s* transfer was registered, and that he must be placed on the list of contributories as a past shareholder. *In re* Contract Corporation. Gooch's Case - 454

INFORMAL ANSWER — *Formal Words omitted.*] An answer, in which the formal words, "In answer to the said bill, we say as follows," were omitted, was directed to be filed. Bowes *v.* Farrar - - - - - 71

INFORMATION—War Department—Parties 558
See Petition of Right.

INJUNCTION—Action on policy of insurance 522
See Restraining Action on Policy.
—— Contract—War Department - - 558
See Petition of Right.
—— Copyright in advertisement - - 407
See Copyright in Advertisement.
—— Copyright—Colourable imitation - 431
See Colourable Imitation.
—— Trade-mark - - - 348, 542
See Trade-mark. 1, 2.
—— *Ultra vires*—Turkish company - 322
See Powers of Directors.
—— Works in mine—Arbitration clause - 572
See Submmission to Arbitration. 2.

INSOLVENT — Discharge — Subsequent revival of debt - - - - 484
See Revival of Debt.

INTEREST ON COSTS — *Administration — Order that Costs should be added to a Security and charged upon the Property comprised therein.*] By orders of the Court, made in 1862 and 1863, certain costs to which a Petitioner was entitled were directed "to be added to the moneys secured to him" by a deed, and it was ordered that the same should "stand as a charge upon" the property comprised in the deed. The deed referred to was a grant, in consideration of £400, of an annuity of £40 a year for lives to the Petitioner, secured by the covenant of the grantor, and by a charge of the annuity upon certain specified real and personal estate. The order said nothing about interest:—*Held*, independently of the *Attorneys Act*, 1860, that inasmuch as the costs were an equitable charge, they bore interest at 4 per cent. Lippard *v.* Ricketts - - - - - 291

INTESTACY—Executors not entitled to residue [275
See Executor taking beneficially.

INVESTMENT—Money in Court—Costs under special Act - - - - 227
See Costs under Special Act.
—— Purchase-money under Settled Estates Act
See Settled Estates Act. 1, 2. [9, 31

JOINT TENANT—Gift to be secured for *A.* and her children - - - 415
See Gift to Wife and Children.

JUDGMENT AGAINST EXECUTORS—*Practice—Administration—Creditors' Suit—Proof of Debt—Proof of Debt against Devisees of Real Estate.*] In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) *held* to be *primâ facie* evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence. Harvey *v.* Wilde 438

JURISDICTION—Infant—Charge on reversionary interest - - - - 251
See Maintenance of Infant.
—— Injunction to restrain action on policy 522
See Restraining Action on Policy.
—— Winding-up—Removal of liquidator 492
See Liquidator.

LAPSE—Death after date of will - - 343
See Death before Testator.

LEASE—Agreement for—Mistake - - 85
See Mistake in Agreement.

LEASEHOLDS—Renewable—Equitable charge on portion of reversion - - 295
See Renewable Leaseholds.

LEGACY—Charged as a debt - - 456
See Legacy charged as a Debt.
—— Marshalling - - - 92, 234
See Marshalling. 1, 2.
—— Satisfaction of - - - - 236
See Advancement.

LEGACY CHARGED AS A DEBT—*Legacy to Wife—Debt charged on Specific Devises.*] A testator, by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use and benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property; and if she so desired, this, as well as all just debts and obligations due from him, to be discharged as the first act of his executors:—*Held*, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as the rest of the property. Mannox *v.* Greener - 456

LEGACY DUTY—Charitable agency - 96
See Mortmain.

LIABILITY — Acknowledgment of — Insurance company - - - - 148
See Unstamped Policy.
—— Trustees—Family arrangement - 167
See Family Arrangement.

LIEN—Deposit—Rescinded contract - 124
See Conditions of Sale.
—— Freight—Mortgage of ship - - 32
See Mortgage of Ship.
—— Policy of insurance—Premiums - 4
See Lien on Policy Moneys.

LIEN ON POLICY MONEYS—*Mortgagor and Mortgagee—Payment of Premiums by Mortgagor subsequently to Bankruptcy—Salvage Money.*] The mortgagor of a policy of insurance became bankrupt, but, notwithstanding his bankruptcy, continued to pay the premiums on the policy:—*Held*, that the premiums so paid were in the nature of salvage moneys, and ought to be repaid, with interest at 4 per cent. out of the policy moneys.

LIEN ON POLICY MONEYS—*continued.*
Shearman *v.* British Empire Mutual Life Assurance Company - - - - 4
LIFE INSURANCE—Injunction to restrain action
See Restraining Action on Policy. [522
—— Mortgage of policy—Bankruptcy of mortgagor
See Lien on Policy Moneys. [4
—— Proof in winding-up - - - 72
See Proof by Policy-holder.
LIQUIDATOR—*Voluntary Liquidation—Removal of Liquidators—Jurisdiction of Court—Wishes of Shareholders.*] The Court has jurisdiction under sect. 141 of the *Companies Act*, 1862, to remove liquidators appointed at a meeting of a company at which resolutions for a voluntary liquidation have been passed where no personal unfitness is suggested against them, if it is of opinion that it is for the general benefit of the company that they should be removed; but will be cautious in exercising that jurisdiction where the shareholders are alone interested in the question, and they almost unanimously support liquidators whom they have appointed.—Insurance company *A.* having absorbed several other companies was itself amalgamated with insurance company *B.*, which had also absorbed others. Company *B.* was ordered to be wound up compulsorily, being admitted to be insolvent. Provisional liquidators had been previously appointed, who were subsequently appointed official liquidators under the order. Between the time of the compulsory order being made and their appointment company *A.* passed resolutions for a voluntary winding-up, and appointed other persons liquidators. On an application by the only dissentient shareholder in company *A.*, supported by the liquidators of company *B.*, to remove the liquidators of company *A.*, and replace them by those of company *B.* :—*Held*, that, though the general benefit of company *A.* was a due cause which gave the Court jurisdiction to remove their liquidators, and the Court was of opinion that it was for the benefit of the company that there should be only one set of liquidators for the combined companies, inasmuch as the question was one in which the shareholders alone were interested, the Court would not interfere with their discretion.—Company *B.* being in the position of an insolvent debtor of company *A.*, was not entitled to be considered.—The Court will not hear individual creditors of a company in opposition to an application by a creditor which is opposed on behalf of the company itself. *In re Marseilles Extension Railway and Land Company* (Law Rep. 4 Eq. 692) considered. *In re* British Nation Life Assurance Association - - 492
—— Personal liability for costs - - 278
See Costs of Liquidation.

MAINTENANCE OF INFANTS—*Reversionary Interest—Scheme.*] The Court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency. De Witte *v.* Palin 251

MANAGER OF BANK—Summons to give evidence in winding-up - - - 6
See Witness in Winding-up.
MARINE INSURANCE — Unstamped policy — Acknowledgment of liability - 148
See Unstamped Policy.
MARRIAGE SETTLEMENT—Trust for wife—Dissolution of marriage - - 421
See Divorced Wife.
MARSHALLING—*Charitable Legacy—Pure and Impure Personalty—Direction to marshall—Statute of Mortmain* (9 *Geo.* 2, *c.* 36).] A testator directed all the rest, residue, and remainder of his personal estate which might be legally applied for such purposes to be paid unto and equally between six hospitals therein named (two of which had power by law to take and hold land notwithstanding 9 Geo. 2, c. 36, while the other four had not); and he directed that his estate should be so marshalled and administered as to give the fullest possible effect to the bequest in favour of charitable institutions thereinbefore contained; and he gave his residuary real estate and all the residue of his personal estate which should not be applicable to and applied in the trusts and purposes aforesaid unto the *Middlesex Hospital*, that institution being empowered by law to receive the same :—*Held*, that the bequest to the six hospitals included impure personalty, and that such impure personalty must be applied as far as possible in payment of the shares of those of the six hospitals which had power to take and hold land. Wigg *v.* Nicholl 92

2. —— *Construction—Deficiency of Personal Estate—Legacy and Residue of Devise—Court of Appeal—Erroneous Decision.*] Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it.—A testator, after giving a pecuniary legacy devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts :—*Held*, that the real estate was not bound to contribute rateably with the legacy to meet the deficiency.—*Hensman* v. *Fryer* (Law Rep. 3 Ch. 420) not followed. Dugdale *v.* Dugdale - - - - - 234
—— Charity—Scotch will - - - 60
See Indian Law.
—— Mortgages of leaseholds and reversion 295
See Renewable Leaseholds.
MESNE PROFITS — *Ejectment — Action against Executor — Money had and received — Proof of wrongful possession by Testator.*] Earls *A.*, *B.*, and *C.*, being successive tenants in tail of property held under an inalienable Parliamentary title, and *B.* having, after the death of *A.*, entered into possession of the entailed estates, and, together with them, of certain leaseholds formerly in the possession of *A.*, the executors of *A.* brought an action of ejectment against *B.* to recover possession of the leaseholds as part of *A.'s* estate. *B.* having died before trial of the action, another action was brought against *C.*, the successor in title. *C.*, who was also executor of *B.*, compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that £4000 should be allowed as a debt from *B.'s* estate in respect of rents received by *B.*

MESNE PROFITS—*continued.*
Before the compromise a creditor's suit was instituted and a decree made for the administration of *B.'s* estate, which was insolvent. On a summons by *A.'s* executors to prove against *B.'s* estate for the amount of the rents actually received by him:—*Held*, that the judgment given in the action against *C.* was not evidence of wrongful possession by *B.*, which could serve as a foundation for the claim, and that the admission by the executor as to mesne profits in the compromise was inoperative, being made after the decree. Talbot *v.* Earl of Shrewsbury - - 503

MINING LEASE—Arbitration claim - 572
See Submission to Arbitration.

MISTAKE—Advertisement—Settled Estates Act
See Settled Estates Act. 4. [467

—— Agreement for lease—Option of lessee 85
See Mistake in Agreement.

—— Will—Words left out—Number of children
See Mistake in Will. [54

MISTAKE IN AGREEMENT—*Specific Performance—Mistake—Agreement for Lease for Seven or Fourteen Years—Option of Lessee—Authority of Agent.*] The Court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.—Accordingly, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:—*Held*, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years:—*Held*, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority. Powell *v.* Smith - - 85

MISTAKE IN WILL—*Will—Construction—"I leave to my sister"—Good Gift of Residue—Gift to A.'s three Children held to include a fourth.*] A testatrix made a will, which she declared to be her "last will and testament," and thereby appointed an executor, and, after giving legacies, proceeded as follows: "After these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic.*) to my sister," *M. P.*, "without any power or control whatsoever of her husband," *J. P.*, in case of her death to be equally divided amongst her children or grandchildren:—*Held*, a good gift of the residue to the sister.—Bequest to *W.* and *E. B.'s* three children of £10 each, and of furniture equally to be divided amongst them.—*W.* and *E. B.* had four children:—*Held*, that the four were each entitled to a legacy of £10, and a share of the furniture. *In re* Bassett's Estate. Perkins *v.* Fladgate - - 54

MORTGAGE—Company—Deposit of deeds 507
See Bankers' Lien.

—— Company—Shares - - - 507
See Mortgage of Shares.

—— Policy of Insurance—Bankruptcy of mortgagor - - - - 4
See Lien on Policy Moneys.

—— Priority—Writ of sequestration - 95
See Sequestration.

MORTGAGE—*continued.*

—— Renewable leaseholds—Purchase of reversion - - - - - 295
See Renewable Leaseholds.

—— Ship - - - - - - 32
See Mortgage of Ship.

MORTGAGE OF SHARES—*Loan to a Company—Security of Shares—Shareholders or Creditors.*] A hotel was built at the *London* terminus of a railway, by a company, on land leased to them by the railway company. The hotel company borrowed money from the railway company, to complete their hotel, upon the security of unissued shares, which were placed in the names of trustees, with power to sell the shares and reduce the amount of debt. The hotel was afterwards sold to the railway company, and the hotel company was thereupon wound up:—*Held*, upon summons under the winding-up, that the two companies being distinct and separate, the railway company were not to be treated as shareholders in the hotel company, but as creditors, and were entitled to deduct from their purchase-money the advance made upon the security of the shares. *In re* City Terminus Hotel Company. South Eastern Railway Company's Claim - - 10

MORTGAGE OF SHIP—*Assignment of Freight—Priority—Notice.*] The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him.—The owner of a ship assigned the freight not yet earned, and, three days afterwards, with the knowledge of the assignee, mortgaged the ship to the Defendants, who registered their mortgage. The assignee neglected to give notice of his claim upon the freight to the mortgagees:—*Held*, that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees. Wilson *v.* Wilson - - 32

MORTMAIN—*Will—Mortmain Act* (9 *Geo.* 2, *c.* 36)—*Gift to existing Charity—Objects of Charity—Acquisition of Land—Discretion of Trustees—Pure and Impure Personalty—Payment of Legacy Duty—Costs.*] A bequest of pure personalty to an existing charity, the application of the funds of which rests in the absolute discretion of the trustees thereof, is good, although some of the objects of the charity may involve the acquisition of land.—The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personalty.—Next of kin appearing in opposition to a charitable bequest, and failing, *held* not entitled to costs as between solicitor and client. *Carter* v. *Green* (3 K. & J. 591) not followed. Wilkinson *v.* Barber - - - 96

—— Marshalling - - - - 92
See Marshalling. 1.

MOVEABLE AND IMMOVEABLE PROPERTY—Indian law—Succession - - 60
See Indian Law.

NOTICE—Mortgage of ship—Assignment of freight
See Mortgage of Ship. [32

OPTION OF LESSEE—Mistake in agreement 85
See Mistake in Agreement.

PAID-UP SHARES—Payment in "cash" - 387
See Payment by Money's Worth.

PARTICULARS OF SALE - - - 124
See Conditions of Sale.

PARTIES—Petition of Right - - 558
See Petition of Right.

—— Special case - - - - 517
See Borrowing Powers.

PARTITION SUIT—Interest—Costs charged on share - - - - - 291
See Interest on Costs.

—— Question of law—Form of decree - 160
See Survivorship.

PARTNERSHIP—Accounts—Discovery in suit 25
See Discovery relevant to Relief.

—— Dissolution—Unsaleable asset - 427
See Partnership Accounts.

PARTNERSHIP ACCOUNTS—*Dissolution—Unsaleable Asset—Valuation.*] Where part of the assets of a partnership consisted of a government contract entered into in the name of one of the partners and containing a proviso against alienation:—*Held*, that upon a dissolution of the partnership, the partner in whose name the contract was taken, and who continued to carry it on, must be debited in the accounts with its value, to be ascertained by a reference to Chambers. Ambler *v.* Bolton - - - - 427

PAST MEMBER—Transfer to infant - 454
See Infant Transferee.

PAYMENT—Out of Court—Costs under special Act - - - - - 227
See Costs under Special Act.

—— Out of Court—Woman past child-bearing 245
See Woman past Child-bearing.

—— Shares—"Cash" - - - 387
See Payment by Money's Worth.

—— Unauthorized by directors of company 322
See Powers of Directors.

PAYMENT BY MONEY'S WORTH—*Companies Act*, 1862, *ss.* 16, 23, 38, 74—*Companies Act*, 1867, *s.* 25—*Allottee of "fully paid-up" Shares, Liability of.*] A holder of shares allotted to him as "fully paid-up," will, on the winding-up of the company, now be placed on the list of contributories to it, unless he can shew that the shares were paid for "in cash," or that the 25th section of the *Companies Act*, 1867, was otherwise complied with.—The cancellation of a debt due from the company for service is not payment in cash within the meaning of the section.—Whether payment in cash by *A.* for the allotment of fully paid-up shares to *B.*, or whether the cancellation of a debt due to the allottee for money lent would be payment in cash within the section, *quære*. *In re* Metropolitan Public Carriage and Repository Company. Cleland's Case - - - 387

PECUNIARY GIFTS—Void agreement—Creditors
See Fraudulent Conveyance. 3. [184

PETITION—Settled Estates Act - 433, 557
See Settled Estates Act. 3, 5.

PETITION OF RIGHT—23 & 24 *Vict. c.* 34—*Information—Continuing Trespass—Injunction—Jurisdiction.*] A motion in a suit by the Attorney-General for an injunction to restrain a contractor with the Secretary of State for War from continuing on the site of Government land, after notice to quit given under the powers of the contract; and a motion by the contractor (who had presented a Petition of Right) for an injunction to restrain the Secretary of State for War from preventing the Suppliant completing his contract, and from continuing the superintending officer of engineers in the supervision of the works, ordered to stand until the hearing of the suits.—*East Lancashire Railway Company* v. *Hattersley* (8 Hare, 72) considered.—*Semble*, it is wrong to join any one with the Queen as a Respondent to a Petition of Right; but, *quære*, whether a demurrer would be the correct mode of raising the objection.—*Semble*, that to an information by the Attorney-General against a contractor praying relief in respect of a contract for works upon land belonging to the War Department, the Secretary of State for War should be party.—Whether also, the contractor's remedy under these circumstances was by Petition of Right or by bill against the Secretary of State, *quære*. Kirk *v.* The Queen. Attorney-General *v.* Kirk - - - 558

PIRACY—Trade-mark - - 348, 542
See Trade-mark. 1, 2.

PLEADING—Bankrupt plaintiff—Charge of fraud
See Bankrupt Shareholder. [202

—— Plea that defendant not administratrix 262
See Executor de son Tort.

POLICY OF INSURANCE—Injunction to restrain action - - - - 522
See Restraining Action on Policy.

—— Lien on money for premiums—Mortgage—Bankruptcy of mortgagor - - 4
See Lien on Policy Moneys.

—— Proof in winding-up - - - 72
See Proof by Policy-holder.

—— Unstamped—Acknowledgment of liability
See Unstamped Policy. [148

POWER—Appointment—Condition - 136
See Conditional Appointment.

—— Appointment—Excessive Appointment 397,
See Excessive Appointment. 1, 2. [533

—— Appointment—Instrument in writing—Will
See Appointment by Will. [402

—— Appointment—Vesting of shares before appointment—Conversion - - 533
See Conversion.

—— Appointment by married woman - 1
See Appointment by Married Woman.

—— Appointment by will of prior date - 266
See Appointment by Residuary Gift.

—— Delegated power - - - 397
See Excessive Appointment. 1.

—— Limited, followed by general power - 136
See Conditional Appointment.

—— Revocation—Voluntary settlement - 365
See Voluntary Settlement.

—— Sale—Administrator *durante minore ætate*
[423
See Administrator durante minore ætate.

POWERS OF DIRECTORS—*Turkish Trading Company — English Directors — Libel — Costs — Payments—Ultrà Vires—Injunction.*] It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special power given to such ultimate authority—whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms) — are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association.—English directors of a foreign railway company, which was subject to Turkish law (as to which there was no evidence before the Court), were restrained from applying the funds of the company in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company; but were not, under the circumstances of the case, ordered to repay the amount of certain of the costs already so satisfied by them. Pickering *v.* Stephenson [322

PRACTICE—Creditors' suit—Evidence of debt *See* Judgment against Executors. [438

—— Informal answer - - - 71
See Informal Answer.

—— Payment out of Court—Costs under special Act - - - - - 227
See Costs under Special Act.

—— Production of documents - 477, 580
See Production of Documents. 1, 2.

—— Settled Estates Act 9, 31, 433, 467, 557
See Settled Estates Act. 1—4.

—— Special case - - - - 517
See Borrowing Powers.

—— Transfer of suit from County Court - 101
See County Court Jurisdiction.

—— Writ of sequestration—Discharge of writ—Acquiring new title - - 195
See Sequestration.

PRECATORY TRUST - - - 49
See Gift, Absolute or in Trust.

PRESUMPTION—Woman past child-bearing 245
See Woman past Child-bearing.

PRIORITY — Mortgage of ship—Assignment of freight - - - - 32
See Mortgage of Ship.

PRIVILEGED COMMUNICATION—Production [477, 580
See Production of Documents. 1, 2.

PRODUCTION OF DOCUMENTS—*Privileged Communications before Litigation — Solicitors and Clients.*] In a suit against a company for specific performance of a contract dated in 1863, production was required from the company of correspondence passing, before the institution of the suit, between the former engineer and solicitors of the company, and between the present solicitors and the secretary and the agents, sub-agents, engineers, surveyors, and directors of the company, and cases and opinions of counsel advising on behalf of the company in respect of the subject-matter of the suit:—*Held*, that the whole of this correspondence relating to the subject-matter of the contract, which might lead to litigation, whether it had done so or might do so, or whether it was probable or improbable that it would do so, was privileged, and production was refused.—*Lord Walsingham* v. *Goodricke* (3 Hare, 122) and *Hawkins* v. *Gathercole* (1 Sim. (N.S.) 150) not followed. Wilson *v.* Northampton and Banbury Junction Railway Company - - - - - 477

2. —— *Claim of Privilege—Sufficiency of Affidavit.*] Documents passing between the Defendants or their agents and their solicitor *ante litem motam*, and stated in the affidavit as to documents to be "confidential communications between solicitor and client with reference to matters which are now in question in this cause," are described sufficiently to protect them from production.—*Manser* v. *Dix* (1 K. & J. 451—469) followed. Macfarlan *v.* Rolt - - - - 580

PROFESSIONAL ADVISER—Voluntary settlement *See* Voluntary Settlement. [365

PROOF—Winding-up—Compensation to manager *See* Compensation for Salary. [417

PROOF BY POLICY-HOLDER — *Life Assurance Company—Winding-up—Value of Current Policy—Estimate of Amount of Claim—Companies Act*, 1862, *s.* 158.] In estimating the value of a current policy in a life assurance company in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the same premium in a solvent office.—*Bell's Case* (Law Rep. 9 Eq. 706) followed. *Lancaster's Case* (*Albert Arbitration*) disapproved. *In re* English Assurance Company. Holdich's Case - 72

PURCHASE-MONEY—Settled Estates Act—Interim investment - - - 9, 31
See Settled Estates Act. 1, 2.

PURE PERSONALTY—Mortmain—Marshalling *See* Marshalling. 1. [92

REFERENCE TO ARBITRATION 555, 572
See Submission to Arbitration. 1, 2.

REGISTRATION—Bill of sale - - 178
See Unregistered Bill of Sale.

RELEASE—Married Woman—Lapse of time 167
See Family Arrangement.

REMOTENESS — *Will — Construction — Absolute Interest—Indefinite Failure of Issue.*] Testator, by will made in 1821, after a gift of leaseholds to his daughter *E.*, gave all the remainder of his property whatsoever to his wife *D.*, the income to her for life, and at her death unto *E.*, for her own benefit and her children, or one only child if she should have any (all that was given to *E.* being for her own benefit, and not to be subject to the debts, control, or disposition of any husband she might marry); but if *E.* should die without issue, the leaseholds were to be enjoyed by *D.* for life, and at her death to his sister *S.* for her life,

REMOTENESS—*continued.*
and at her death, together with all that was left to *D.* for her life, to be equally divided between all the grandchildren of *S.*—*E.* died without having had a child:—*Held*, that *E.* was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to *D.*'s life interest, and that the limitations over, if *E.* "should die without issue," were void for remoteness. Fisher *v.* Webster - - 283

RENEWABLE LEASEHOLDS—*Equitable Charge—Renewal of Lease—Subsequent Purchase by Lessee of Reversion—Charge upon Reversion—Election—Marshalling of Securities.*] In 1805 a lessee for lives, with proviso for renewal, charged the hereditaments (subject to his own life interest in part) with £1500, and, subject thereto, conveyed the premises in trust for his son, *W. W. T.*, the testator in the cause. In 1811 *W. W. T.* settled the premises, subject to the life interest in part, and as to the whole charged with the £1500, on himself, his wife, and eldest son; and further charged the same with £2000 for his younger children. In 1815, the tenant for life having died, *W. W. T.* executed deeds reciting (erroneously) that the whole of the £1500 charges had been paid off, and taking from the trustee (in breach of trust) a conveyance of the hereditaments to himself absolutely, freed from the £1500 charges: but there was no evidence that this deed was ever acted on. In 1818, the *cestuis que vie* having all died, *W. W. T.* obtained a renewal of the lease, but without prejudice to a question whether the lessee had not lost the right of compelling a renewal. In 1819 *W. W. T.* purchased the reversion in fee of the leaseholds, the latter not being merged. In 1838 *W. W. T.* was party to a deed whereby he recited that he had paid £1200, part of the £1500, but that when he did so he did not intend that the same should sink into or be extinguished in the premises. In 1845 he appropriated the remaining £300 to himself as part of his share in the estate of the *cestui que trust* thereof, who had died. By his will, after reciting to the like effect, he devised the hereditaments comprised in the deed of 1805, subject to all such incumbrances as the same might at his decease be subject to, and from the payment of which he exonerated his personal estate, to his son *T. T.* absolutely, subject to a further charge.—*W. W. T.* died in 1859. *T. T.* entered into possession and disputed his liability to pay either the £1500 or the £2000, but paid interest up to 1869:—*Held*, that the charges paid off were kept alive for the benefit of *W. W. T.*'s personal estate:—*Held*, also, that the renewed lease of 1818 was subject to the charges:—*Held*, also, that the reversion in fee, purchased in 1819, was subject to the charges:—*Held*, further, that if the reversion had not been so charged, *T. T.* could not have availed himself of the devise without giving effect to the testator's intention.—*W. W. T.* having, in 1845, mortgaged the hereditaments comprised in the deed of 1805:—*Held*, that if the above sums had been charged on the leaseholds only, and not on the reversion, the mortgagees must have had recourse to the reversion first, on the principle of *Barnes* v. *Racster* (1 Y. & C. Ch. 401). Trumper *v.* Trumper - - - - - 295

RESIDENCE IN HOUSE—*Right to Let—Will.*] Bequest to wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate:—*Held*, that the free occupancy of the house entitled the wife either to reside in it or to let it during her life. Mannox *v.* Greener - - - - 456

RESIDUE—Legacy charged with trust of uncertain amount - - - - 45
See Trust of uncertain Amount.
—— Marshalling—Real estate—Receiving legacy
See Marshalling. 2. [234
—— Omission of words "I leave to my sister" 54
See Mistake in Will.

RESTRAINING ACTION ON POLICY—*Policy of Insurance—Conflict of Evidence—Jurisdiction—A Court of Law the Proper Tribunal.*] A bill having been filed by an insurance company to cancel a life policy as obtained by misrepresentation, a motion was made to restrain an action upon the policy which was commenced immediately after the filing of the bill:—*Held*, that this Court had complete jurisdiction, but that the question would be more suitably tried before a jury; and motion refused accordingly. Hoare *v.* Bremridge - - - - - - 522

RESULTING TRUST—*Voluntary Gift—Augmentation of Trust Fund—Investment in Names of Trustees—Advancement—Appointment.*] A sum of consols was vested in the trustees of a marriage settlement, upon the usual trusts, for the husband and wife successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends and paid them to him under a power of attorney from the trustees, to invest an additional sum of £2000 consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, and paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—*Held*, that there was no resulting trust of the sum of £2000 for the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund.—A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum of £2000 as an augmentation of the trust fund. Four years afterwards the husband and wife, under a power in the settlement, appointed the original fund, "or the trust fund and property representing the same," to two of their children:—*Held*, that the appointment passed only the original fund, and not the augmentation. *In re* Curteis' Trusts. [217

REVERSION — Infant — Charge for maintenance
See Maintenance of Infants. [251
—— Renewable leaseholds — Purchase of reversion - - - - - 295
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REVIVAL OF DEBT—*County Court Appeal—Insolvency—Bill of Sale.*] In 1859 *W.* became insolvent and obtained his discharge. The Defendant was at that time a scheduled creditor for £200. In 1865 *W.* gave to the Defendant a bill of sale on his furniture and effects to cover the prior debt of £200 and further advances with interest at £5 per cent. Sundry payments were

REVIVAL OF DEBT—*continued.*
made by *W.*, who was charged £15 per cent. interest; and the amount due, apart from the £200, was reduced to £38. In February, 1867, *W.* gave the Defendant a note of hand for £100. The Defendant then seized under the bill of sale, and sold the furniture and effects for £121, paying thereout £40 due to the landlord. *W.* became bankrupt in October, 1867, and the Plaintiff was creditors' assignee:—*Held* (affirming the decision of the Judge of the *Dudley* County Court), that the £200 due prior to the insolvency could not be revived; that the bill of sale was a security only for the advances made thereon with interest at £5 per cent., and not for any further advances; that the seizure was illegal, and the £40 paid to the landlord was an improper payment; and that the £121 realized by the sale must be refunded. Peakman *v.* Harrison - - - - 484

REVOCATION—Power of voluntary settlement *See* Voluntary Settlement. [365

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SCHEME—Charity—Alteration in - - 17
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SCHOLARSHIP—Test of—Exhibition to university - - - - 434
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SCHOOL—Exhibition to university - - 434
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SCOTCH LAW—Charity—Marshalling - 60
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SECRETARY FOR WAR—Information—Contract for works - - - - 558
See Petition of Right.

SEPARATE ESTATE—Account at bankers—Sums paid in by husband - - 241
See Bankers' Account.

SEQUESTRATION—*Suit to enforce—Lien—Purchaser with Notice—Debtor out of Jurisdiction—Practice—Pleading—Discharge of Order—Acquiring New Title — Amendment.*] The title of a person claiming under a writ of sequestration issued by the Court of Chancery prevails over that of a mortgagee under a mortgage for value made in order to avoid the effect of the writ, and with full knowledge on the part of the mortgagee of all the circumstances. An order for payment into Court of a fund in the hands of a stakeholder in this country may be made in a suit in which one of two parties (each of whom claims the fund under a person residing abroad) is Plaintiff, and the other a Defendant, although the person residing abroad may not be made effectually a party to the suit; but—*Semble*, an order will not be made for payment of the fund out of Court until such person has been served. In a suit of *W.* v. *C.* a writ of sequestration issued against *C.* was irregularly discharged without the knowledge of *W.*, and at the instance of *M.*, acting on behalf of *C.* *W.* afterwards filed a bill to enforce a later writ against property to which *C.* had become entitled subsequently to the discharge of the writ, and which was claimed by *M.* under a mortgage by *C.* After filing the bill *W.*, for the first time, became aware of the existence of the order discharging the writ, and procured such

SEQUESTRATION—*continued.*
order to be itself discharged, and amended his bill, relying on the first writ:—*Held*, that he had sufficient title at the time of filing the bill to enable him to maintain the suit. Ward *v.* Booth [195

SETTLED ESTATES ACT—*Settled Estate—Sale—Interim Investment of Purchase-Money*—(19 & 20 *Vict. c.* 120), *s.* 25—23 & 24 *Vict. c.* 38, *ss.* 10, 11.] Money received by trustees upon a sale under the *Leases and Sales of Settled Estates Act* can be invested temporarily only in Exchequer bills or consols as directed by sect. 25 of the Act, and cannot be invested in any of the other investments in which cash under the control of the Court may be laid out.—*In re Cook's Settled Estates* (Law Rep. 12 Eq. 12) not followed. *In re* Shaw's Settled Estates - - - - - - 9

2. —— *Settled Estate—Interim Investment of Purchase-Money—Cash under the Control of the Court*—23 & 24 *Vict. c.* 38, *s.* 10.] The purchase-money of land sold under the *Settled Estates Act* is cash under the control of the Court for the purpose of investment under General Orders made under the provisions of sect. 10 of the Act of 23 & 24 Vict. c. 38. *In re* Thorold's Settled Estate [31

3. —— *Practice — Petition — Cons. Ord.* xli. *Rule* 20.] A Petition under the *Leases and Sales of Settled Estates Act* cannot be set down for hearing until the expiration of twenty-one days from the publication of the last of the advertisements, as required by rule 20 of Cons. Ord. xli., although that time may prevent the Petition being set down till after the long vacation. *In re* Townsend's Settled Estates - - - - 433

4. —— *Practice—Error in Advertisements—Difference of Description between Advertisements and Petition.*] In the heading of advertisements issued in pursuance of sect. 20 of the *Leases and Sales of Settled Estates Act*, under General Order xli., rule 15, the Act is sufficiently described as "the *Leases and Sales of Settled Estates Act*."—The object of the advertisements is to give information to the parties, and where the description in them, though not so full as that in the title of the Petition, is sufficiently explicit to prevent mistakes, the Court may waive the irregularity. *In re* Bicknell's Settled Estates 467

5. —— *Practice—Advertisement of Petition—Cons. Ord.* xli. *Rule* 20—*Married Woman—Examination.*] A Petition under the *Settled Estates Act* was allowed to be placed in the paper for the last petition day before the long vacation, although the twenty-one days from the last advertisement prescribed by Cons. Order xli., r. 20, would not then have expired.—The examination of a married woman, one of the Petitioners, was ordered to be taken in Court when the Petition came on to be heard. *In re* Taylor's Settled Estates [557

SETTLEMENT—Equity to - - - 253
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—— Gift of share to be secured for *A.* and her children - - - - 415
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—— Marriage—Trust for wife—Dissolution of marriage - - - - 421
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SHARES—Mortgage of to another company 10
See Mortgage of Shares.
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See Borrowing Powers.

SPECIALTY DEBT—*Administration Suit—Proceeds of Testator's Estate in Court—Specialty and Simple Contract Creditors—Devisees and Executrixes—Right of Retainer.*] A testator died leaving a deficient estate, his wife and daughter being executrixes.—The wife having real estate settled on her for life, with a general power of appointment, had appointed it as collateral security for a mortgage debt of the testator. This debt had not been paid at the date of the decree:—*Held*, that the right of the widow as surety to be indemnified created a simple contract debt only, and did not entitle her to retain as against specialty creditors.—The daughter was absolutely entitled under a settlement, subject to the testator's life interest, to funds out of which the trustees had power to advance £2000 to the testator on his bond, which they did. They afterwards made large further advances to him on promissory notes:—*Held*, that the daughter had a right to retain as against specialty creditors the £2000 and interest from testator's death, but not the subsequent advances.—The rule laid down in *Henderson* v. *Dodds* (Law Rep. 2 Eq. 532) in regard to costs, followed. Ferguson *v.* Gibson [379

STAKEHOLDER—Order for payment of fund into Court - - - - - 195
See Sequestration.

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16 & 17 Vict. c. 51, s. 2—*Succession Duty* 357
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30 & 31 Vict. c. 131, s. 25—*Companies* 387
See Payment by Money's Worth.
32 & 33 Vict. c. 35—*Apportionment* - 419
See Apportionment of Dividends.

STATUTORY DECLARATION—*Colony—Affidavit—Practice.*] A statutory declaration not intituled in the cause was allowed to be filed with an affidavit intituled in the cause verifying the signatures of the declarants. Whiting *v.* Bassett 70

SUBMISSION TO ARBITRATION—*Common Law Procedure Act*, 1854, *s.* 13.] The provisions of the *Common Law Procedure Act*, 1854, s. 13, that where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint his arbitrator to act alone, and an award made by such arbitrator shall be binding on both parties, do not apply where the reference is to three arbitrators, one to be appointed by each of the parties thereto, and the third to be chosen by the two so appointed. Gumm *v.* Hallett - - 555

2. *Common Law Procedure Act*, *s.* 11—*Mining Lease—Arbitration Clause—Bill for Injunction—Order of Reference.*] The *Common Law Procedure Act* (17 & 18 Vict. c. 125) ought to receive a liberal interpretation in Courts of Equity; therefore, where a mining lease contained a clause that whenever any dispute should arise touching, *inter alia*, the working of the mine, or compensation to be paid, or anything to be done under the covenant, or touching the rights or duties of either party, the matter in difference should be referred to two arbitrators or their umpire in conformity with the Act (17 & 18 Vict. c. 125), the Court, under the 11th section, on the Defendant's motion, stayed proceedings on a bill filed by the lessors praying for an injunction to restrain workings alleged to be improper, and an account, and directed a reference. Willesford *v.* Watson [572

SUCCESSION—Indian law—Moveable and immoveable property - - - 60
See Indian Law.

SUCCESSION DUTY—16 & 17 *Vict. c.* 51, *s.* 2—*Entitled "upon" the Death of any Person.*] A testator died in 1850, having devised his real estates to trustees upon trust to accumulate the rents for twenty-one years, and then to convey and assure the estates and accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving a heir at law who died in 1865. Four co-heiresses of the testator succeeded to the property in 1871:—*Held*, that succession duty was payable.—*Attorney-General* v. *Gell* (3 H. & C. 615) commented on but followed. Ring *v.* Jarman [357

SURVIVORSHIP—*Will — Construction—Tenancy for Life—Gift of Residue in Fee—"Surviving Children or their Families"—Children or Descendants — Partition Suit — Jurisdiction — Form of Decree.*] Testator, who died in 1854, gave all his property to his wife for life, and after giving certain pecuniary legacies and annuities, devised and bequeathed to his son *C.* all the residue, after his

SURVIVORSHIP—*continued.*

mother's decease, and to his heirs, and in case *C.* should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of *C.*, who died in 1869 a bachelor and intestate:—*Held*, that this was, like that in *King* v. *Cleaveland* (4 De G. & J. 477), a gift on the death of *C.* without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead:—*Held*, also, that "families" meant children, and not descendants of the testator's children.—In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided in this Court. Burt *v.* Hellyar - 160

TAXATION OF COSTS—*Practice—Costs—Taxation—Common Law Scale.*] The costs of proceedings in Court in the course of which several witnesses were examined *viva voce*, and which involved the question whether a certain claimant was legitimate, were ordered to be taxed upon the common law scale, so as to give the equity counsel refreshers for every day after the first day of the hearing, as in the case of counsel of the Common Law Bar. Hill *v.* Hibbit - - - 221

TRADE-MARK — "*Leopoldshall*" — *Injunction.*] The name of the place of origin of an article may become a trade-mark. Consideration of the kind of evidence necessary to support an interlocutory injunction in such a case. Radde *v.* Norman 348

2. —— *Piracy—Injunction.*] A manufacturer who has produced an article of merchandize [*e.g.* a new pattern of cloth] and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction. Hirst *v.* Denham - - 542

TRANSFER—Suit in County Court—Value of property - - - - 101
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TRANSFER OF SHARES—Infant - - 454
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—— Resulting—Gift to augment trust fund 217
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TRUST OF UNCERTAIN AMOUNT — *Will — Legacy—Honorary Trust—Good Gift of Residue of Legacy.*] Testator devised and bequeathed all his estate and effects upon trust for his niece for her life; and after her death he bequeathed legacies, and directed that all the residue of his estate should be divided as a mixed fund amongst three residuary legatees. He then desired that his executors should pay to the trustees of a charity a sum of £1000 stock for the following use, namely, "to pay the required amount for painting and keeping in repair" the gravestone of himself and his niece, for a certain day (his birthday) yearly, "if required," and to pay "the balance that may remain" for the purposes of the charity:—*Held*, that the trust to keep in repair the gravestone was honorary only; and hence, though the sum which would be required for that purpose was uncertain in amount, the uncertainty did not render void the gift of the residue of the sum of £1000 stock. Hunter *v.* Bullock 45

TRUSTEE — Liability — Family arrangement—Settled Account - - - - 167
See Family Arrangement.

TURKISH TRADING COMPANY—English Directors - - - - - 322
See Powers of Directors.

ULTRÀ VIRES—Payment of costs of suit for libel - - - - - 322
See Powers of Directors.

UNCERTAINTY—Trust of uncertain amount 45
See Trust of uncertain Amount.

UNREGISTERED BILL OF SALE—*Bankruptcy—Execution — Possession — Trustee.*] *M.* was the holder of an unregistered bill of sale from *C.*, dated the 9th of January, 1869. On the 10th of March, 1871, the sheriff seized the goods of *C.* comprised in the bill of sale. On the 14th of March *M.* left a man on the premises of *C.*, jointly with the sherriff's officer. On the following day *C.* was adjudicated bankrupt, and *M.*, in ignorance of and after the adjudication, paid out the sheriff's officer and entered into possession; on a motion by *M.* that the trustee be ordered to pay to him the proceeds of the sale of the goods:—*Held*, that the bill of sale, being unregistered, was void as against the trustee; that no such possession was taken by *M.* as to relieve him from the effects of non-registration; that payment out of the sheriff's officer after the adjudication did not better his position, and that the proceeds of the sale of the goods belonged to the trustee, but charged with the repayment to *M.* of the moneys paid by him to the sheriff. *Ex parte* Mutton. *In re* Cole - - - - - 175

UNSTAMPED POLICY — *Winding-up — Marine Insurance — Acknowledgment of Liability.*] *A.* insured a ship in a mutual marine insurance association in 1863, and the policy, which was not stamped, was annually renewed up to the year ending March, 1868. In February, 1868, the ship, with *A.* on board, was lost at sea. The loss

UNSTAMPED POLICY—*continued.*
of the ship was reported to the association, and it appeared from entries in the minute books that the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to *A.* had been appointed.—The company was ordered to be wound up in January, 1870, and *A.*'s widow obtained letters of administration to him in December, 1871. Upon a claim by the widow under the winding-up for the amount secured by the policy:—*Held*, that there was a sufficient admission of liability in the books of the company to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence.—*Smith's Case* (Law Rep. 4 Ch. 611) distinguished. *In re* Teignmouth and General Mutual Shipping Association. Martin's Claim. - 148

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—— Directions that shares shall vest on execution of will - - - - 343
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VOLUNTARY GIFT—Resulting trust—Augmentation of trust fund - - 217
See Resulting Trust.

VOLUNTARY SETTLEMENT—*Real Estate—No Power of Revocation—Professional Advice—Subsequent Acts of Settlor—Settlement relieved against.*] A voluntary settlement should contain a power of revocation; if it does not, the parties who rely upon it must prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the Court sees, from the surrounding circumstances, that the settlor believed the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settlor, interfere and give relief against it. Hall *v.* Hall. Hall *v.* Hall - - - - - 365

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—— Gift to wife to be applied to bringing up children - - - - 49
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—— Appointment by—"Instrument in writing" [402
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—— Appointment by married woman - 1
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WINDING-UP PETITION—*Benefit Building Society — Withdrawing Member — Discretion of Court.*] A member of a benefit building society who had given notice of withdrawal, entitling him to be paid in rotation, and who had not been paid, *held* not entitled, *ex debito justitiæ*, to an order for winding up the society; and, under the circumstances, order refused. *In re* Planet Benefit Building and Investment Society 441

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WITNESS IN WINDING-UP — *Companies Act*, 1862, *s.* 115 — *Summons to examine Witness — Costs.*] Under sect. 115 of the *Companies Act*, 1862, the manager of a bank where a contributory has had an account is liable to attend and be examined, and to produce any books and documents relative to such account. *In re* Contract Corporation. Druitt's Case - - - 6

WITNESS IN WINDING-UP—*continued.*

2. —— *Companies Act*, 1862, *s.* 115—*Summons to examine Witness—Costs.*] Under sect. 115 of the *Companies Act*, 1862, any person indebted to a contributory is liable to attend and be examined as to the means of the contributory.—Witnesses summoned under sect. 115 of the Act, and refusing to attend, will in future be liable to pay the costs of compelling their attendance. *In re* Land Credit Company of Ireland. Trower and Lawson's Case - - - - - 8

WOMAN PAST CHILD-BEARING—*Payment out of Court—Married Woman aged Forty-nine—Presumption against having Children by an existing Husband.*] The presumption that a woman aged forty-nine years and nine months, who had been long married to a husband still living and had never had any children, would not have any by him, acted upon. *In re* Millner's Estate 245

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BIBL. LONDIN. UNIV.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.